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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

DONALD LANDRY, ET AL.,

Petitioners,

v.

TOM REILLY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in the absence of individualized suspicion, the Fourth Amendment permits a State to compel a class of persons who have been convicted of a crime to submit to a search and seizure of blood samples containing their DNA to be included in state and federal DNA data banks for use in the investigation and prosecution of criminal offenses.

LIST OF PARTIES

The petitioners here, who were the plaintiffs in the Massachusetts Superior Court and the appellees in the Massachusetts Supreme Judicial Court, are Donald E. Landry, Miriam Cartagena, William Pistorino, Albert Troisi, Vincent Gallello, John Hallett, and Geoffrey Pironti.

The respondents here, who were the defendants in the Superior Court and the appellants in the Supreme Judicial Court, are: Tom Reilly, the Attorney General of the Commonwealth of Massachusetts; Carl M. Selavka, Director of the Massachusetts State Crime Laboratory; Reed Hillman, Superintendent of the Massachusetts Department of State Police; Sheila Hubbard, Chairman of the Massachusetts Parole Board; Michael Maloney, Commissioner of the Department of Corrections; and John O'Brien, the Commissioner of Probation.

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OPINIONS BELOW

The opinion and order of the Massachusetts Supreme Judicial Court is reported at 429 Mass. 336, 709 N.E.2d 1085 (1999), and is reproduced as Appendix A, *post*, at App. 1a-26a. The opinion and order of the Massachusetts Superior Court may be found at 9 Mass. L. Rptr. No. 4, 74 (Nov. 9, 1998), and is reproduced as Appendix B, *post*, at App. 27a-51a.

STATEMENT OF JURISDICTION

The Supreme Judicial Court issued its decision and order in this case on April 13, 1999. On June 30, 1999, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including August 20, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. G. L. c.22E, §§1-15, enacted by Mass. St. 1997, c.106, §§1-8, is the Massachusetts DNA data bank statute at issue in this case (hereinafter "the act"), and is reproduced as Appendix C, *post*, at App. 52a-60a.

3. 515 Code Mass. Regs. §§1.01-1.06 (1998), are regulatory provisions promulgated by respondents under the act. The regulations concern DNA "collection" pursuant to the

act, and are reproduced as Appendix D, *post*, at App. 61a-71a.

STATEMENT OF THE CASE

Our nation has become increasingly enthralled in recent years with the crime-solving capability of DNA technology. The rapidly-evolving ability of forensic laboratories to obtain DNA "match" evidence has enabled law enforcement to solve — expeditiously, and often with what appears to be nearly mathematical certainty — particular cases that might well otherwise have languished in the "cold case" file.

Within the past decade, the forensic promise of evolving DNA technology has led to the nationwide enactment of legislation providing for the establishment of state-run DNA data banks to facilitate the investigation and prosecution of criminal offenses. With financial assistance from the federal government, all fifty states have now enacted such legislation, and the state data banks established thereby have been linked together through the FBI's national DNA data bank, called the Combined DNA Identification System, or "CODIS."

In 1997, Massachusetts became one of the last states to establish a state DNA data bank. Under the provisions of the Massachusetts act, the Massachusetts Department of State Police has been given the mandate of establishing a data bank comprised of the DNA of individuals who have been convicted of any one of thirty-three designated offenses. G.L. c. 22E, §3 (App. 55a).[1] The act applies prospectively to any individual convicted of one of the designated offenses, as

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[1] For a list of the included offenses, see also App. 29a.

well as to those who were on probation or parole following conviction of a designated offense at the time the act took effect. G.L. c. 22E, §3. Mass. St. 1997, c. 106, §8 (App. 55a, 60a). The act further applies to any individual who, on or after its effective date, is incarcerated in a Massachusetts prison or house of correction and who has, at any time in the past, been convicted of a designated offense.[2] Respondents have estimated that, when it initially went into effect, the act subjected 10,000 individuals to DNA testing under its terms, and that 1,500 individuals will have their DNA added to the data bank every year the act remains in effect.

Through its implementing regulations, the act requires that DNA samples be "collected" by piercing the subject's finger with a "fixed depth lancet" and "milk[ing]" approximately eight drops of blood from the subject's finger onto a specially treated piece of paper. 515 Code Mass. Regs, §§1.04(3)(j) and (k) (App. 66a). Respondents elected to employ this collection method, in part, because it will permit them, once the seized blood has been air-dried, to store the DNA located therein "indefinitely." 515 Code Mass. Regs, §1.05(4) (App. 71a). The record in this case establishes that each blood sample seized under the act contains enough DNA to allow respondents to conduct multiple genetic tests; and because the blood is to be stored indefinitely, such tests can be conducted into the foreseeable future.

The primary purpose of the act is to "deter[] and discover[] crimes and recidivistic criminal activity." St. 1997, c.106, §1 (App. 52a). To that end, the Legislature found "that the collection and analysis of DNA samples is an integral part of the investigation and prosecution of criminal of-

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[2] See *Murphy* v. *Department of Correction*, 429 Mass. 736, 711 N.E.2d 149 (1999) (construing application of act to persons in prison).

fenses . . ." St. 1997, c.106, §2 (App. 52a-53a). Nonetheless, the act requires neither a warrant nor individualized suspicion prior to the extraction of a blood, tissue, or other cellular sample containing DNA. Indeed, the act authorizes state officials to use "reasonable force" to collect DNA samples, indemnifies law enforcement personnel from civil or criminal liability for the use of such force, and makes any refusal to "submit" a criminal offense, punishable by incarceration for up to six months and a fine of up to $1,000. G.L. c.22E, §§4(a), 11 (App. 55a-56a, 59a). The act further requires those required to submit to pay the costs incurred by respondents in "preparing, collecting and processing" their DNA. G.L. c.22E, §4(b) (App. 56a).

After a DNA sample has been extracted, it is forwarded to the State Police Crime Laboratory for analysis, filing, and storage. Upon demand, and without either a warrant or individualized suspicion, DNA information obtained by the Massachusetts State Police pursuant to the act "shall" then be disseminated to (1) law enforcement agencies in Massachusetts, (2) law enforcement agencies in other jurisdictions "to further official criminal investigations and prosecutions," and (3) "the FBI for storage and maintenance in CODIS." G.L. c.22E, §10 (App. 58a-59a).

The act took effect on December 30, 1997. Respondents began "collecting" DNA in January, 1998. App. 30a. Petitioners in this case are seven Massachusetts prisoners, parolees, and probationers who are subject to the seizure, storage, analysis, and dissemination of their DNA by the Massachusetts Department of State Police and other Massachusetts State respondents. App. 9a.

Between January 15 and 26, 1998, petitioners Miriam Cartagena, Albert Troisi, and William Pistorino received notices at their homes from the Massachusetts Department of

Probation informing them of their obligation to submit a DNA sample within ninety days of their convictions. App. 30a. The notices threatened that failure to comply was punishable by a fine, incarceration, or both, and was grounds for revocation of petitioners' probation. *Ibid.* Petitioner Donald Landry received a similar notice from the Massachusetts Parole Board on January 26, 1998, requiring him to submit a DNA sample by March 29, 1998, and stating that his failure to do so was grounds for revocation of his parole. *Ibid.*

On January 24, 1998, respondents forced about 1,100 prison inmates, including petitioners Vincent Gallello, Geoffrey Pironti, and John Hallett, to submit to blood seizures. *Ibid.* On February 4, 1998, respondents began extracting blood from probationers and parolees, after instructing them, under threat of punishment, to report to a National Guard Armory in Dorchester, Massachusetts, which had been set up to receive them. App. 30a-31a. When necessary, respondents used physical force, the threat of force, and the threat of punishment to seize petitioners' blood. App. 31a. Respondents also sought to obtain blood samples from a number of individuals who were not subject to the terms of the act. App. 49a-50a.

STATEMENT OF PRIOR PROCEEDINGS

Petitioners' complaint seeking injunctive and declaratory relief was filed in the Massachusetts Superior Court on February 2, 1998. In a comprehensive memorandum and order entered on August 12, 1998, the Superior Court (Isaac Borenstein, J.) ruled, solely on the basis of count two of petitioners' amended complaint, that the act violates the Fourth

Amendment, and entered a preliminary injunction prohibiting its implementation. App. 28a, 33a, 34a-42a, 50a-51a.[3]

As an initial matter, the Superior Court concluded, and respondents conceded, that "the involuntary taking of a person's blood, to obtain a DNA sample, clearly constitutes a search that triggers the protections of the Fourth Amendment." App. 35a, citing *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989), and *United States* v. *Jacobsen*, 466 U.S. 109, 113 n.5 (1984).

Relying on *Schmerber* v. *California*, 384 U.S. 757 (1966), and *Winston* v. *Lee*, 470 U.S. 753 (1985), the Superior Court held that, when law enforcement is seeking to obtain evidence for the purpose of prosecuting criminal wrongdoing, the Fourth Amendment protects against any search entailing an intrusion that goes beyond the body's surface "'[i]n the absence of a *clear indication* that in fact such evidence will be found. . . .'" App. 36a, quoting *Schmerber*, 384 U.S. at 770 (emphasis added by the Superior Court). Since respon-

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[3] Count two of the amended complaint states as follows:

> The suspicionless, nonconsensual extraction of DNA samples and the widespread disclosure of DNA records and analyses mandated or permitted under the DNA Seizure and Dissemination Act constitute a significant and unreasonable invasion of personal privacy and may cause significant harm to the individuals whose DNA is seized. The involuntary, suspicionless seizure of plaintiffs' DNA, and the testing, analysis, and widespread dissemination of the records and data derived therefrom violates plaintiffs' rights to be free from unreasonable searches and seizures, as guaranteed by art. 14 of the Massachusetts Declaration of Rights and the Fourth and Fourteenth Amendments to the United States Constitution.

dents conceded below that the blood searches mandated by the act are suspicionless, and thus fall short of *Schmerber*'s "clear indication" standard, the Superior Court went on to consider respondents' argument that the act should be validated under this Court's "special needs" case law, in which some searches that intrude upon bodily integrity have been ranked as reasonable even in the absence of any individualized suspicion. App. 37a-38a, citing *National Treasury Employee Union* v. *von Raab*, 489 U.S. 656 (1989), and *Skinner* v. *Railway Labor Executives' Ass'n*, *supra*.

The Superior Court acknowledged that "'particularized exceptions to the main rule [requiring individualized suspicion] are sometimes warranted, based on "special needs."'" App. 40a, quoting *Chandler* v. *Miller*, 520 U.S. 305, 313 (1997). The Court concluded, however, that this exception could not be invoked to save the act because, as *Chandler* emphasized, in order to be counted as "special," an asserted governmental need to conduct suspicionless searches must stem from concerns "'other than crime detection.'" App. 40a, quoting *Chandler*, 520 U.S. at 314. Here, the Legislature's stated purpose in passing the act was to "assist local, state, and federal criminal justice and law enforcement agencies in . . . deterring and discovering crimes and recidivistic criminal activity." App. 42a. On this basis, the Superior Court concluded that the suspicionless bodily intrusions mandated by the act were not justified by concerns "other than crime detection," and that the "special needs" exception, as defined by *Chandler*, was therefore inapplicable. App. 41a.

Finally, the Superior Court considered respondents' contention that the "special needs" doctrine should be expanded in this case to embrace even suspicionless crime detection because (1) the searches and seizures mandated by the act

were, in respondents' view, insignificant and (2) an insistence upon the usual requirement of individualized suspicion would effectively frustrate the act's important law enforcement goals.

As to the first proposition, the Superior Court viewed *Schmerber* as foreclosing the possibility that the involuntary taking of a human blood sample could be dismissed as *de minimis*, regardless of how reasonably respondents were able to carry out the extraction process. App. 38a-39a. And the Court rejected, as incompatible with the Fourth Amendment itself, respondents' position that its "need" to establish a DNA data bank should be deemed "special" simply because an insistence upon individualized suspicion would frustrate its fulfillment: "'The mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment.'" App. 41a, quoting *Mincey* v. *Arizona*, 437 U.S. 385, 393 (1978). Having thus concluded that the suspicionless, evidentiary blood searches mandated by the act were "inconsistent with Fourth Amendment jurisprudence," the Superior Court entered a preliminary injunction barring respondents from enforcing its provisions. App. 50a-51a.

Respondents appealed. The Supreme Judicial Court of Massachusetts allowed the respondents' application for direct appellate review. App. 2a. After briefing and oral argument, the Supreme Judicial Court reversed, concluding that the act "does not violate the Fourth Amendment." App. 11a-17a.

The Supreme Judicial Court agreed that the involuntary collection of DNA under the terms of the act constitutes a "'search and seizure' for purposes of the Fourth Amendment." App. 11a. And the Court did not dispute the Superior Court's conclusion that the searches and seizures at issue

are carried out in the absence of any individualized suspicion. The Court concluded, however, that even absent any such suspicion, the extraction of blood from convicted persons to obtain a DNA sample for "identification purposes only," App. 15a, was not unreasonable within the meaning of the Fourth Amendment.

The Supreme Judicial Court reached this conclusion by conflating two very different concepts of "identification." The first involves the collection and use of information to ascertain the identity of a person in the criminal justice system, i.e., to find out, or verify, who someone is. The second refers to the collection of evidence by law enforcement to discover and prove who is responsible for the commission of a particular criminal offense, i.e., to "identify" a perpetrator. When describing the act itself, the Court acknowledges both that the evidentiary collection of DNA under its terms is "'an integral part of the investigation and prosecution of criminal offenses,'" App. 4a, and, that, once collected, petitioners' DNA will be put to its purpose under the act of "resolving past and future crimes." App. 16a. However, in rejecting petitioners' claim that probable cause is a constitutional prerequisite to this sort of evidentiary search and seizure of their DNA, the Court treats the act as if its purpose were only to corroborate petitioners' identity.

Thus, the Court begins its Fourth Amendment analysis from the premise that "convicted persons, unlike other citizens, have a diminished expectation of privacy in their identity," App. 13a, and concludes that DNA testing is reasonable, in the constitutional sense, because it is indistinguishable from the use of fingerprint, photograph, and arrest records as a means of identifying and apprehending criminal suspects. Weighing what it describes as a "minimally intrusive search" against the State's "established and indisputable

interest in preserving a permanent identification record of convicted persons *for resolving past and future crimes*," the Court concludes that "[t]he balance of interests clearly weighs in favor of the use of DNA in accordance with the Act." App. 16a (emphasis supplied).

However, when addressing the Superior Court's central conclusion that the act is irreconcilable with *Schmerber* v. *California*, *supra*, and *Winston* v. *Lee*, *supra*, the Supreme Judicial Court takes a radically different view of what "identification" means under the act.

> The holdings in the *Schmerber* and *Winston* decisions . . . must be understood in the context of Fourth Amendment analysis which considers the nature of the involved person's reasonable expectation of privacy. Neither case involved a situation where the person subject to testing or a medical procedure had been convicted of a crime. Further, neither case contemplated a situation where the bodily intrusion occurred *simply for the purpose of adding to a record of identity and not to search for evidence of a crime*. If a convicted person has a low expectation of privacy in his identity by reason of the taking and storing of fingerprints, photographs, and other criminal records, then the privacy interests which trigger the assumption that probable cause or individual suspicion is needed to amplify a record of identification by a nonharmful procedure are eliminated. In this context, the *Schmerber* and *Winston* requirements of probable cause and a search warrant *are simply in-*

> *applicable, as long as the DNA sample is taken from a convicted person for identification purposes only.*

App. 15a (emphasis supplied).

The Supreme Judicial Court vacated the order of the Superior Court and remanded the case for further proceedings consistent with its opinion. App. 26a. On remand, the Superior Court dismissed petitioners' complaint.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE SUPREME JUDICIAL COURT UPHOLDING MASS SUSPICIONLESS DNA TESTING OF CONVICTED PERSONS CONFLICTS WITH THE FOURTH AMENDMENT'S PROHIBITION AGAINST UNREASONABLE SEARCHES AND SEIZURES.

A. *Suspicionless DNA seizure statutes disregard the applicable standard set by this Court for evidentiary searches that go beyond the surface of the body.*

The searches and seizures that have been mandated by the Massachusetts Legislature are not based on individualized suspicion. As such, the act is at odds with the "central teaching of this Court's Fourth Amendment jurisprudence," *Terry* v. *Ohio*, 392 U.S. 1, 21 n.18 (1968), which, in the present context of evidentiary searches for criminal law enforcement purposes, requires that justification for the search of a person be "individualized." *Ybarra* v. *Illinois*, 444 U.S.

85, 91-92 (1979) (because Fourth Amendment confers "individualized protection," search of a person must be supported on grounds that are "particularized with respect to that person"). See also, *Brown* v. *Texas*, 443 U.S. 47 (1979) (absent individualized suspicion, statute requiring a person to identify himself to law enforcement upon request effected an unconstitutional search and seizure).

Indeed, the historical record demonstrates that mass, suspicionless searches and seizures pursuant to broad statutes constituted "precisely the evil the Fourth Amendment was intended to eliminate." *Illinois* v. *Krull*, 480 U.S. 340, 364 (1987) (O'Connor, J., dissenting) (observing, *id.* at 365, that, unlike an unlawful warrant, a "legislature's objective in passing a law authorizing unreasonable searches . . . is explicitly to facilitate law enforcement; it is a measure of the Framers' fear that a passing majority might find it expedient to compromise Fourth Amendment values that these values were embodied in the Constitution itself"). "As recently confirmed in one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken, see W. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* (1990) (Ph.D. Dissertation at Claremont Graduate School) . . . what the Framers of the Fourth Amendment most strongly opposed . . . were general searches — that is, searches by general warrant, by writ of assistance, by broad statute, or by any other similar authority." *Vernonia School District 47J* v. *Acton*, 515 U.S. at 669 (O'Connor, J., dissenting).

If a magistrate issued a warrant directing the Massachusetts State Police to carry out the searches and seizures that have been mandated by this act, such a directive would have been repugnant to the Framers because it would not be based "upon probable cause." In enacting what amounts to a gen-

eral warrant for the DNA of all individuals convicted of a designated offense, the Legislature has thus institutionalized the very threat to personal privacy rights that impelled the adoption of the Fourth Amendment.[4]

Suspicionless DNA seizure statutes such as the act at issue here are unconstitutional for the further reason that they ignore the distinction between a person's external features, which, being "knowingly expose[d] to the public," *Katz* v. *United States*, 389 U.S. 347, 351 [1967], are accorded no Fourth Amendment protection at all, see, e.g., *United States* v. *Dionisio*, 410 U.S. 1, 14 (1973) (voice); *United States* v. *Mara*, 410 U.S. 19 (1973) (hand writing), and a person's internal characteristics, whose seizure necessarily implicates precisely those "interests in human dignity and privacy which the Fourth Amendment protects." *Schmerber* v. *California*, 384 U.S. 757, 769-770 (1966).

Schmerber, which involved the seizure of blood from a suspected drunk driver for purposes of testing its alcohol content, was the Court's first occasion to examine the Fourth Amendment's limitations on governmental interference with the right of the people to be secure "in their persons." See *id.* at 767-768. In order to safeguard the privacy interests implicated by such a search and seizure, *Schmerber* properly draws a line at the "body's surface," *id.* at 769, and requires that any evidentiary search going beyond that line be sup-

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[4] See, Thomas K. Clancy, "The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures," 25 U. Mem. L. Rev. 483, 489, 628 (1995) (concluding that "the historical record demonstrates that the framers believed that individualized suspicion was an inherent quality of reasonable searches and seizures," that suspicionless searches were the "chief vice the framers sought to prevent," and that judicial insistence upon individualized suspicion is necessary in order to "avoid[] the slippery slope of an unprincipled reasonableness analysis")

ported by an individualized determination of probable cause, regardless of how "reasonably" it may be effected:

> The interests in human dignity and privacy which the Fourth Amendment protects forbid *any* . . . [search and seizure] involving intrusions beyond the body's surface . . . on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

Id. at 769-770 (emphasis supplied).

Following *Schmerber*, the Court held in *Cupp* v. *Murphy*, 412 U.S. 291 (1973), that a person compelled by law enforcement to submit to the scraping of some skin and blood cells from beneath his fingernail, see *id.* at 292, undergoes "the type of severe, though brief, intrusion upon cherished personal security that is subject to constitutional scrutiny." *Id.* at 295 (internal citation omitted). Significantly for purposes of the Fourth Amendment issues raised by suspicionless DNA seizure statutes, the intrusion at issue in *Cupp* v. *Murphy* was not found reasonable on the theory that it could be viewed as *de minimis*. To the contrary, the Court recognized that the search and seizure required to obtain skin and blood cells from beneath a person's fingernail was a "severe" intrusion, despite the fact that it could be effected quickly and with virtually no physical risk or pain. The bodily intrusion at issue in *Cupp* v. *Murphy*, although "severe," was reasonable only because the police had probable cause to be-

lieve that Murphy had murdered his wife, see *id.* at 294-295, and would destroy the cellular evidence linking him to that particular crime if it were not immediately seized from his person. *Id.* at 296.

Finally, in *Winston* v. *Lee*, 470 U.S. 753 (1985), the Court held that a proposed surgical procedure to remove a bullet from a suspect under arrest for robbery was unreasonable under the circumstances. In reaffirming *Schmerber*'s holding that any compelled intrusion going beyond the surface of the body encroaches "upon an area in which our society recognizes a significantly heightened privacy interest," the Court concluded that law enforcement in that case had not demonstrated the "substantial justification" necessary before such an intrusion could be deemed reasonable, *id.* at 767, even though it "plainly had probable cause" to believe that the suspect had committed the robbery under investigation, and that the bullet, if seized from his body, would corroborate his responsibility for that crime. *Id.* at 763.

In *Schmerber* and its progeny, the Court has adopted a bright line rule, which DNA seizure statutes plainly violate: evidence obtained from a person that goes "beyond mere physical characteristics . . . constantly exposed to the public," *Cupp* v. *Murphy*, 412 U.S. at 295 (internal citation omitted), and that entails instead an intrusion "beyond the body's surface," *Schmerber*, 384 U.S. at 767-768, implicates the "most personal and deep-rooted expectations of privacy" protected by the Fourth Amendment, *Winston* v. *Lee*, 470 U.S. at 760, and therefore requires a "clear indication" that evidence of a specific crime "in fact . . . will be found." *Schmerber*, 384 U.S. at 767-768.

Furthermore, there can be no colorable claim of exigency here to justify discarding the warrant requirement, and the guarantee of individualized fairness inherent in judicial issu-

ance of pre-seizure process, because the genetic evidence sought by the act cannot be altered, hidden, or destroyed. See *Schmerber,* 384 U.S. at 770 ("absent an emergency," a warrant is ordinarily required before evidentiary intrusions into the human body may be deemed reasonable).

What the Supreme Judicial Court has dismissed as a "minimally intrusive . . . pin prick," App. 16a, is no less invasive than the "severe" search and seizure at issue in *Cupp* v. *Murphy*, a case the Court neglects to cite. The Supreme Judicial Court also blatantly misrepresents the evidentiary purpose of suspicionless DNA seizure statutes by equating them to measures, such as fingerprinting, that are "for identification purposes only." App. 15a. "Finger-printing, as a routine part of the booking process, is justified by the legitimate interest of the government in knowing for an absolute certainty the identify of the person arrested, in knowing whether he is wanted elsewhere, and in ensuring his identification in the event he flees prosecution." 3 Wayne F. LaFave, SEARCH AND SEIZURE, §5.3(c), at 131 (3d ed. 1996). The purpose of the DNA "identification" generated by a suspicionless DNA seizure statute, however, is not to ascertain the identity of someone who has previously been convicted of a crime. Rather, its purpose is to supply the missing evidentiary link between the person being tested and a crime under investigation, i.e., to "identify" the person responsible for that crime. The DNA seizures at issue here are thus indistinguishable from the kind of evidentiary search and seizure at issue in *Schmerber*, for which probable cause is a constitutional prerequisite.

The Supreme Judicial Court ignores *Schmerber*'s bright line, blinded by the more brilliant allure of forensic DNA technology. But *Schmerber*'s premise — that "[t]he integrity of an individual's person is a cherished value in our society,"

384 U.S. at 772 — remains valid. As the Superior Court correctly concluded, "searches which invade bodily integrity cannot be executed as mere fishing expeditions to acquire useful evidence." App. 40a.

B. *The Supreme Judicial Court's conclusion that no reasonable suspicion need accompany an evidentiary search into a person's body, so long as that person has been convicted of a criminal offense in the past, is inconsistent with the decisions of this Court.*

The fact that petitioners are convicted criminals is obviously central to the Supreme Judicial Court's conclusion that the suspicionless searches and seizures at issue in this case are reasonable, notwithstanding respondents' concession that they are unable to articulate any reason for believing that a compelled intrusion into any one of the thousands of persons whom the act has targeted will produce any evidence that links any one of them to any particular crime. But the mere fact that an individual has been convicted of a crime is not enough to compel her to submit to a search of the person for evidence of criminal wrongdoing for which no reasonable suspicion exists. While it has been stated that no prisoner has a reasonable expectation of privacy in his prison cell, *Hudson* v. *Palmer,* 468 U.S. 517 (1984), this Court has *never* held that an individual may be subjected to an unreasonable search and seizure of the person simply by virtue of his status as someone who has been convicted of a crime. To the contrary, in removing prison cells as places reached by the Fourth Amendment, *Hudson* takes pains to stress that the persons committed therein continue to "be accorded those

rights not fundamentally inconsistent with imprisonment itself . . ." *Id.* at 523 (observing, *id.* at 524, that the "continuing guarantee of these substantial rights to prison inmates is testimony to a belief that the way a society treats those who have transgressed against it is evidence of the essential character of that society").

Nor is the act limited to searches of people who happen to be behind bars at the time of the intrusion. As the act is presently being enforced, Massachusetts probationers and parolees are being rounded up, in large numbers, and made to report to National Guard Armories around the Commonwealth, where the State Police are forcibly seizing their DNA. The expectation of privacy that reasonably may be accorded to the millions of persons in this nation who have been convicted of a crime cannot justify this disturbing state of affairs.

A person's fundamental rights of personal privacy and bodily integrity are not extinguished at the moment that person is convicted of a crime but instead become "diminished," *Wolff* v. *McDonnell,* 418 U.S. 539, 555 (1974), only to the extent that these rights cannot be reconciled with the "needs and exigencies" of "the regime to which [the convicted person has] been lawfully committed." *Id.* at 555-556. The overriding institutional concern of a prison is internal security. The overriding institutional concern of supervised release is insuring compliance with the terms of that release. But the act before the Court does not purport to compel persons who are in prison or on probation or parole to submit to searches and seizures of their persons in order to further any identified penological security concern, or to insure compliance with any specified term of supervised release. Since the evidentiary intrusions that the act mandates are justified neither by any quantum of individualized suspicion nor by any

need or exigency of the regulatory regimes that have diminished the privacy rights of the persons targeted by the act, the reduced nature of those rights may not reasonably be relied upon as any basis for upholding the act. See, *Bell* v. *Wolfish*, 441 U.S. 520, 558-560 (1979) (holding, in light of the "unique . . . security" concerns of detention facilities, that government officials could reasonably subject an inmate to a visual body cavity search for contraband on "less than probable cause" after the inmate had received a contact visit); *Griffin* v. *Wisconsin*, 483 U.S. 868 (1987) (upholding warrantless search of probationer's home pursuant to state regulation requiring "reasonable suspicion" that probationer possesses contraband). See also, *National Treasury Employees Union* v. *von Raab*, 489 U.S. at 680 (Scalia, J., dissenting) (stressing that reasonableness of search of the person in a prison setting must be linked to the "uniquely dangerous nature of [the prison] environment").

It is predictable that legislative attempts to strip away unfashionable constitutional protections will be directed first at the least powerful and most despised among us. We countenance such attempts at our collective peril. This Court should grant certiorari in order to make clear that the Fourth Amendment forbids a state from relying solely on the fact that a person has been convicted of a crime in the past as an excuse to conduct unreasonable evidentiary searches into that person's body, and in order to declare that individuals who have been convicted of a crime are "people" within the meaning of the Fourth Amendment who may not, therefore, be compelled to submit to mass, suspicionless, evidentiary searches and seizures of their "persons."

C. *The decision of the Supreme Judicial Court upholding mass DNA testing cannot be justified under the "special needs" doctrine.*

In the Superior Court, the respondents sought to justify suspicionless DNA testing under this Court's "special needs" doctrine, a rationale relied upon by some courts that have addressed this issue. See App. 14a. While the Superior Court correctly concluded that the act does not fit within "the closely guarded category of constitutionally permissible suspicionless searches," *Chandler* v. *Miller*, 520 U.S. at 309, the Supreme Judicial Court purported to rest its opinion on other grounds. App. 16a. The record in this case would nonetheless permit this Court to consider the "special needs" question if certiorari is granted.[5]

In any event, it may safely be assumed that the act will indeed lead to DNA "matches" and "hits," at least over time and at least with respect to some crimes. But it is precisely the act's prosecutorial purpose that makes the attempt to bring it within the ambit of the special needs doctrine improper. In the course of striking down Georgia's attempt to compel candidates for public office to submit to suspicionless urine testing, the Court in *Chandler* circumscribed the special needs doctrine by emphasizing that the need asserted to justify a suspicionless search regime must indeed be

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[5] The record as to this question includes, *inter alia*, studies by the Massachusetts Department of Correction regarding recidivism rates among Massachusetts convicts, affidavits by geneticists and molecular biologists regarding the rate of "hits" and errors in forensic DNA laboratories, and an affidavit by a forensic psychiatrist regarding the potential deterrent effect of a DNA data bank on criminal behavior.

"special," which the Court defined as some concern "other than crime detection." *Id.* at 314.[6]

The act's goal of solving crimes, while concededly an important one, cannot by that token be beyond ordinary constitutional restraints. To the contrary, the manner in which a state is permitted to go about identifying, prosecuting, and punishing those whom it believes to be criminally dangerous lies at the very core of those restraints. See, *Vernonia School District 47J* v. *Acton*, 515 U.S. at 669 (O'Connor, J., dissenting) (arguing that "[t]he view that mass, suspicionless

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[6] That the impetus for a suspicionless search regime must be something other than crime detection is also reflected in earlier cases upholding such searches, which *Chandler* carefully distinguishes. See, *Vernonia School Dist. 47J* v. *Acton*, 515 U.S. at 658-659 & n.2 (upholding suspicionless urine testing of student athletes where results "are not turned over to law enforcement authorities," and noting that "'evidentiary' searches . . . generally require probable cause"); *Treasury Employees* v. *von Raab*, 489 U.S. at 666 (upholding suspicionless urine testing of federal Customs Service employees where regulation in issue provided that test results could "not be used in a criminal prosecution of the employee without the employee's consent"); *Skinner* v. *Railway Labor Executives' Assn.*, 489 U.S. at 620-621 (suspicionless post-accident testing of federal railway operators not unreasonable where purpose of regime was to prevent accidents and "not to assist in the prosecution of employees") (internal citation omitted). See also, *New Jersey* v. *T.L.O.*, 469 U.S. 325 (1985), in which Justice Blackmun first invoked the term "special needs" in concluding that a public school teacher with individualized suspicion could search a student's purse on less than probable cause in light of the special needs of the school setting, which is "focus[ed] . . . on teaching and helping students, rather than on developing evidence against a particular troublemaker." *Id.* at 353 (Blackmun, J., concurring). Compare, *Willis* v. *Anderson Community School*, 158 F.3d 415, 420 (7th Cir. 1998) (applying "special needs" analysis only *after* determining that search in question motivated by "'concerns other than crime detection'") (quoting *Chandler*).

searches, however evenhanded, are generally unreasonable [should] remain[] inviolate in the criminal law enforcement context"). The Supreme Judicial Court attempts to evade *Chandler* simply by asserting that the intent of DNA seizure statutes is "not to search for evidence of a crime." App. 15a. This ignores reality.

II. THE QUESTION PRESENTED HAS NATIONAL IMPORTANCE: THE ESTABLISHMENT OF A DNA DATA BANK BY THE COMMONWEALTH OF MASSACHUSETTS IS PART OF A NATIONAL PROGRAM OF MASS DNA COLLECTION WHICH WILL HAVE PROFOUND EFFECTS ON INDIVIDUAL LIBERTY AND PRIVACY.

It was only in 1987 that the first person was convicted in the United States on the basis of DNA evidence.[7] While the claims made for DNA evidence were debated, the forensic use of DNA rapidly became commonplace. In 1990, Virginia became the first state to require that individuals convicted of certain offenses provide a DNA sample for inclusion in a DNA data bank. See, *Jones* v. *Murray*, 962 F.2d 302 (4th Cir.), cert. denied, 506 U.S. 977 (1992). Four years later, Congress laid the foundation for a national DNA database when it enacted the "DNA Identification Act of 1994."[8]

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[7] *Andrews* v. *State*, 533 So.2d 841 (Fla. Dist. Ct. App. 1988). See, E. Donald Shapiro and Michelle E. Weinberg, "DNA Data Banking: the Dangerous Erosion of Privacy," 38 Cleveland State L.R. 455, 458 n.18 (1990).

[8] 42 U.S.C. §14131 *et seq*, 108 Stat. 2065, P.L 103-322, §§210302 *et seq*. (1994).

The 1994 act authorized the FBI to establish CODIS as the national "index," or data base, of DNA profiles, and provided for grants to state and local law enforcement agencies for DNA collection and testing. Within five years, all fifty States had enacted mandatory DNA seizure statutes establishing state-level DNA data banks. In October 1998, the information in the States' DNA data banks was linked together through the FBI's national system.[9]

As CODIS becomes fully operational, it is estimated that law enforcement agencies will have access to DNA data taken from more than one million Americans.[10] Presently, most States' DNA seizure statutes collect DNA from a class of individuals who have been convicted of designated offenses. The Massachusetts act challenged by petitioners in this case is illustrative of such a statute.

But the classes of persons included in DNA data banks are expanding. Some states have already amended their statutes to require the taking of a DNA sample from any individual convicted of any felony.[11] The FBI has recommended that all violent felonies, burglaries, and juvenile offenses be covered, and that the requirement for submitting to DNA seizures be applied retroactively.[12] At least one state has now mandated

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[9] See, Nicolas Wade, "FBI Set to Begin Using National DNA Database," New York Times, October 12, 1998, A1.

[10] See information published on the website of the National Commission on the Future of DNA Evidence, http://www.ojp.usdoj.gov/nij/dnamtgtrans5welcome.html.

[11] See, e.g., Va. Code Ann. §19.2-310.2 (Michie 1998).

[12] See, Nicolas Wade, *supra* at n.9.

the collection of DNA from anyone *arrested* for a designated offense.[13]

Notwithstanding the expanding scope of mandatory DNA testing in the United States, scant judicial attention has been paid to the fundamental changes in law enforcement brought about by DNA data bank legislation, and to the substantial expansion of governmental power that such legislation represents. For example, nothing in the Supreme Judicial Court's opinion would prohibit mandatory DNA collection from any class of persons with a "diminished expectation of privacy," *e.g.*, high school students, *Vernonia School District 47J* v. *Acton*, *supra*, government employees performing critical functions, *Treasury Employees* v. *von Raab*, *supra*, and welfare recipients, *Wyman* v. *James*, 400 U.S. 309 (1971), so long as government can show that it has "an established and indisputable interest" in the identity of the members of that class.

Moreover, unlike fingerprinting, which is incapable of revealing anything about an individual *except* his identity, the extraction of a DNA sample may disclose a person's entire genetic makeup.

> DNA analysis maps immutable, lifelong characteristics of an individual. Indeed, the immutability is what makes DNA such an ideal

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[13] La. R.S. §15:609 (effective Sept. 1, 1999). See also, 1999 Ct. Proposed S.B. 315 (pending Connecticut bill that, if enacted, will require DNA registration of "each person arrested for a criminal offense at the time of such arrest"). The expansion of data banks to include all arrestees is also being considered by the National Commission on the Future of DNA Evidence. See, n.10, *ante*.

> identifier. However, it is that same immutability that creates the spectre of prejudice. It allows an individual to be placed into a discrete class, cut along lines defined by the most intimate and private facts: one's future physical and psychological health. In addition, . . . the information revealed in a DNA analysis is not unique only to that donor. Information from a donor's genome also reveals the private concerns of the donor's parents, children, and siblings. Seizure of such information, therefore, potentially gives the possessor the power to stigmatize and discriminate against many subjects.

Robert Craig Scherer, "Mandatory Genetic Dogtags and the Fourth Amendment: The Need for a New Post-*Skinner* Test," 85 Georgetown L.J., 2007, 2021 (1997) (footnotes omitted).

Respondents conceded below that the appropriation of a person's DNA under the act will make it "theoretically possible" for them to discover and disseminate that person's entire genetic profile. Like other states, Massachusetts gathers biological samples in a manner that allows DNA to be retained indefinitely, making it available for any testing that may in the future be seen as reasonable, as the application of DNA information technology continues to expand apace.

> Once the capability to perform testing and to collect, store, and correlate information exists, we can be sure that pressures (from both government and segments of the private sector) will mount to do so. There will be calls to

> sacrifice individual privacy and confidentiality for the greater social good, to require involuntary submission of blood and tissue sampling and to reduce control by individuals over their personal information once it is placed in the system and is coursing through interlinked computer networks.

P.L. Bereano, "The Impact of DNA-based Identification Systems on Civil Liberties," in *DNA on Trial: Genetic Identification and Criminal Justice* 119, 124 (1992).

These risks cannot be ignored simply because the government has yet to exercise its ability to make more extensive use of DNA. In *Skinner* v. *Railway Labor Executives Ass'n*, 489 U.S. 602 (1989), the Court concluded that substantial privacy interests were implicated by the taking of a urine sample that *could* disclose "a host of private medical facts." *Id.* at 617. That risk becomes immeasurably greater with DNA, which literally defines, on the molecular level, who and what we are as persons.

CONCLUSION

This case presents a question of exceptional importance — whether an individual who is not reasonably suspected of a crime can be compelled to submit to intrusive DNA testing. The answer to this question will affect legislation enacted by the Congress and by all fifty States requiring DNA testing of millions of Americans and establishing the national DNA database.

This Court should grant certiorari in order to correct the decision of the Supreme Judicial Court that mass DNA testing is permissible under the decisions of this Court, and to repudiate this dangerous elevation of the perceived, politicized needs of law enforcement over the constitutional right to be free from unreasonable search and seizure.

Respectfully submitted,

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August 20, 1999

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APPENDIX A.

DONALD E. LANDRY & others[1] *vs.* ATTORNEY GENERAL & others[2]; WILLIAM BATES, intervener.

Middlesex. March 1, 1999. - April 13, 1999.

Present: WILKINS, C.J., ABRAMS, LYNCH, GREANEY, FRIED, MARSHALL, & IRELAND, JJ.

Deoxyribonucleic Acid. Evidence, Blood sample. *Regulation. Injunction. Administrative Law, Regulations. Constitutional Law,* Search and Seizure, Privacy, *Privacy. Search and Seizure,* Blood sample, Expectation of privacy. *Identification.*

Discussion of the provisions of the DNA database statute, St. 1997, c. 106, codified at G. L. c. 22E, §§ 1-15 [338-340], and implementing regulations [340-341].

The involuntary collection of a blood sample from a person required to give one under the provisions of the DNA database statute, G. L. c. 22E, §§ 1-15, and regulations promulgated thereunder, does not constitute an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution of the United States [343-348] or under art. 14 of the Massachusetts Declaration of Rights [348-350], where the persons subject to the collection procedure had been convicted of a crime and the

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[1] Mariam Cartagena, William Pistorino, Albert Troisi, Vincent Gallello, John Hallett, and Geoffrey Pironti.

[2] The director of the crime laboratory within the Department of State Police (director), the superintendent of the Department of State Police, the chairperson of the Parole Board, the Commissioner of Correction, and the Commissioner of Probation.

State had a high interest in preserving a permanent identification record of such persons, and where the intrusion of the sampling method was minimal.

Where the regulations and protocols concerning the collection of DNA samples under G. L. c. 22E, § 4 *(a)*, set out procedures designed to collect samples in a medically sound and sanitary manner, there is no further requirement under that statute for the promulgation of regulations detailing how law enforcement and correction personnel should act in specific situations that may require "reasonable force" in complying with the statute, in light of 103 Code Mass. Regs. § 505.06-505.07, applicable to inmates and defining "force," such as would necessitate enjoining the present enforcement of the statute. [350-352]

Discussion of privacy issues arising under the DNA database statute. [352-354]

CIVIL ACTION commenced in the Superior Court Department on February 2, 1998.

The case was heard by *Isaac Borenstein*, J.

The Supreme Judicial Court granted an application for direct appellate review and, on its own initiative, transferred a second appeal from the Appeals Court.

Rosemary S. Gale, Assistant Attorney General *(Pamela L. Hunt*, Assistant Attorney General, with her) for the defendants.

Benjamin H. Keehn, Committee for Public Counsel Services (*John Reinstein* with him) for the plaintiffs.

Sandra F. Bloomenthal & Robert T. Bloomenthal, for the intervener, were present but did not argue.

The following submitted briefs for amici curiae:

Lori B. Andrews, Michelle Hibbert, & Harold J. Krent for Institute for Science, Law and Technology, Illinois Institute of Technology.

Tracey Maclin & John F. Palmer for Massachusetts Association of Criminal Defense Lawyers.

Toni G. Wolfman, Colin J. Zick, & Nancy N. Serrano for The Council for Responsible Genetics.

Charles J. Ogletree, Jr, of the District of Columbia, *Emily Hughes,* of Iowa, *Mary Prosser, & Amy R. Goldstein for* Criminal Justice Institute at Harvard Law School & another.

David Wirth, of New York, *& Josephine Ross* for Owen M. Kupperschmid Holocaust Human Rights Project of Boston College Law School & another.

Carolyn Baker Ringel & Wendy J. Murphy for Massachusetts State Senators Cherly A. Jacques & James P. Jajuga & another.

GREANEY, J. In these consolidated appeals,[3] we are concerned with challenges made by the plaintiffs to the validity of the deoxyribonucleic acid (DNA) database statute, St. 1997, c. 106, codified for the most part at G. L. c. 22E, §§ 1-15 (Act). A judge in the Superior Court concluded that the involuntary taking of blood samples from the plaintiffs, in accordance with the directives of the Act, violates both the Fourth Amendment to the United States Constitution and art. 14 of the Declaration of Rights of the Massachusetts Constitution. Based on this conclusion, the judge granted the plaintiffs a preliminary injunction which enjoined the defendants from enforcing any aspect of the Act. We consider the

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[3] The appeals arise out of the same action in the Superior Court. There were different proceedings in the action which led to two separate appeals. In the first appeal (SJC-07899), we granted the defendants' application for direct appellate review. The second appeal (SIC-07916) we transferred to this court on our own motion.

grounds relied on by the judge, and an additional challenge made by the plaintiffs (which was not ruled on by the judge) that the provision in § 4 *(a)* of the Act for the use of reasonable force to obtain a DNA sample when a convicted person refuses to submit to its collection must be delineated by regulation. We conclude that the preliminary injunction cannot be justified on the grounds relied on by the judge, and that it also cannot be supported on the basis that the reasonable force provision is unlawful in the absence of regulations on the matter. Accordingly, we vacate the preliminary injunction.

1. The following background is necessary to an understanding of the issues.

(a) *The Act.* All fifty States have enacted statutes creating a DNA database. By St. 1997, c. 106, the Act was adopted in Massachusetts, and codified as G. L. c. 22E, §§ 1-15. In creating the Act, the Legislature stated its purpose as follows: "It shall be the policy of the commonwealth to assist local, state and federal criminal justice and law enforcement agencies in: (1) deterring and discovering crimes and recidivistic criminal activity; (2) identifying individuals for, and excluding individuals from, criminal investigation or prosecution; and (3) searching for missing persons. Said policy shall be served by establishing facilities for comparing biological evidence recovered during criminal investigations with biological material obtained from offenders convicted of crimes in the commonwealth." St. 1997, c. 106, § 1. The Legislature went on to express its "find[ing] that the collection and analysis of DNA samples is an integral part of the investigation and prosecution of criminal offenses and that such technology is an important tool in the defense of individuals charged with criminal offenses in the commonwealth." St. 1997, c. 106, § 2.

The Act provides as follows. Any person convicted of the perpetration of any of thirty-three enumerated crimes (or an attempt or conspiracy to commit any of them) must submit a DNA sample to the State crime laboratory. G. L. c. 22E, § 3. The Act further requires submission of a DNA sample from any person currently incarcerated, on probation, or on parole as the result of a conviction or judicial determination resulting from a charge of any of the listed offenses, notwithstanding the date of such conviction or judicial determination. G. L. c. 22E, § 3. St. 1997, c. 106, § 8. If a conviction is subsequently reversed and then dismissed, relevant DNA records may be expunged by court order. G. L. c. 22E, § 15. Failure to furnish a DNA sample is punishable by a $1,000 fine or up to six months' imprisonment. G. L. c. 22E, § 11. Law enforcement officers and correction personnel are authorized to use "reasonable force" to assist in collecting the DNA samples "in cases where an individual refuses to submit to such collection as required under [the Act]." G. L. c. 22E, § 4 *(a)*.

A "DNA sample" is defined by the statute as "biological evidence of any nature that is utilized to conduct DNA analysis." G. L. c. 22E, § 1. The Act provides that, once a sample is collected, through a process established by way of detailed regulations, it is forwarded to the director of the State crime laboratory within the Department of State Police (director) for analysis. G. L. c. 22E, § 6. "DNA analysis" entails undertaking "DNA typing tests" on the submitted DNA samples "that generate numerical identification information." G. L. c. 22E, § 1. The result is a "DNA record," which contains the numerical identification information derived from the samples by the analysis. G. L. c. 22E, § 1. Once a sample has been processed, the DNA record becomes a part of the State DNA database, G. L. c. 22E, § 3, and will

also be forwarded to the Federal Bureau of Investigation (FBI) for storage and maintenance in CODIS, or "combined DNA index system," the "[FBI]'s national DNA identification index system which facilitates the storage and exchange of DNA records submitted by state and local criminal justice and law enforcement agencies." G. L. c. 22E, § 1. See G. L. c. 22E, § 10 *(b)*.

The Act limits access to, and use of, the information obtained from DNA samples. G. L. c. 22E, §§ 6-10. DNA records are confidential, are not included in the criminal offender record information system, and may be disclosed only as authorized by the Act. G. L. c. 22E, § 9. The Act states that the director is to forward a DNA record to local police departments, to the Department of Correction, to a sheriffs department, to the parole board, or to prosecuting officers on written or electronic request. G. L. c. 22E, § 10 *(a)*. It further mandates disclosure of DNA records to "local, state and federal criminal justice and law enforcement agencies, including forensic laboratories serving such agencies, for identification purposes in order to further official criminal investigations or prosecutions." G. L. c. 22E, § 10 *(b)* (1). The Act also requires that DNA records be furnished to the FBI for inclusion in CODIS, G. L. c. 22E, § 10 *(b)* (2); that defendants who are charged with crimes as a result of a DNA database search be provided with a copy of their own DNA record, G. L. c. 22E, § 10 *(b)* (3); and that DNA records be made available as necessary to obtain Federal funding. G. L. c. 22E, § 10 *(c)*.

The Act allows the director, at his discretion, to make DNA records, after all personal identifying information is removed, available "to authorized persons or organizations," for the limited purpose of "advancing DNA analysis methods and supporting statistical interpretation of DNA analysis, in-

cluding development of population databases." G. L. c. 22E, § 10 *(d)* (1). DNA records may also be supplied for identifying victims of mass disasters, identifying missing persons, and for "advancing other humanitarian purposes." G. L. c. 22E, § 10 *(d)* (2)-(4).

(b) *Implementing regulations.* In keeping with the Act's provisions, the director has promulgated two sets of emergency regulations concerning the collection, submission, receipt, identification, storage, and disposal of DNA samples, see 515 Code Mass. Regs. §§ 1.01-1.06 (1998); and the testing and analysis, quality assurance, computerized storage, retrieval, and dissemination of the DNA database, see 515 Code Mass. Regs. §§ 2.01-2.16 (1998).

(i) The first set of regulations contains provisions that identify those individuals who may collect DNA samples, details the materials and procedures that those individuals must use to collect the samples and ensure that they are not contaminated, and establishes identification and record-keeping procedures the collectors must utilize during the collection process. See 515 Code Mass. Regs. § 1.04. Eight drops of blood are collected by a qualified person following a finger prick with a lancet provided in a special testing kit. See 515 Code Mass. Regs. § 1.04(3)(g), (j), (k). In addition, the regulations set forth procedures to be used by evidence technicians (that is, the individuals authorized to accept the DNA samples at the State crime laboratory) to receive the samples and record the details necessary for proper identification. 515 Code Mass. Regs. §§ 1.03-1.05. The regulations also specify handling and storage procedures for the DNA samples and their accompanying collection and information cards. 515 Code Mass. Regs. § 1.05(2)-(3). All samples and collected information are to be "stored indefinitely in a secure storage area." 515 Code Mass. Regs. § 1.05(4).

(ii) The second set of regulations spells out the methods to be used to analyze DNA samples, and security measures to prevent unauthorized access to, or disclosure of, information in the DNA database. See 515 Code Mass. Regs. §§ 2.04-2.11. The regulations specify that the DNA database "shall be comprised of data generated from STR testing." 515 Code Mass. Regs. § 2.04(1). STR, or short tandem repeat testing, is "[a] form of testing which provides DNA profiles for loci which contain simple DNA unit repeats."[4] 515 Code Mass. Regs. § 2.03. The regulations go on to outline procedures the director must use to authorize access to the database, and limit more strictly the reasons for which DNA samples and analyses may be disclosed.[5] See 515 Code Mass. Regs.

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[4] In *Commonwealth* v. *Rosier*, 425 Mass. 807, 811-813 (1997), we discussed the STR method of analysis and validated its use in Massachusetts as scientifically acceptable evidence. The most notable feature of STR testing is that STRs found on a DNA strand are likely not to be associated with any known genetic coding function. See National Research Council, The Evaluation of Forensic DNA Evidence 117 (1996).

[5] DNA samples and DNA analyses can be disclosed only:

> "(a) to criminal justice agencies for law enforcement identification purposes, which shall include (at the discretion of the Director) to assist the identification of human remains from mass disasters or to identify whether such remains are from those of a missing person, upon written or electronic request to the Director;
>
> "(b) in judicial proceedings, if otherwise admissible pursuant to applicable statutes or rates;
>
> "(c) for criminal defense purposes, to a defendant who shall have access to samples and analyses performed in connection with the case in which such defendant is charged;

§ 2.13. These regulations also contain provisions describing the expungement procedure. See 515 Code Mass. Regs. § 2.15.

(c) *The plaintiffs' lawsuit.* The plaintiffs' amended verified complaint sought declaratory and injunctive relief. The plaintiffs include a parolee (Landry), two probationers (Cartagena and Troisi), a citizen (Pistorino), and three inmates (Hallett,[6] Gallello, and Pironti), all of whom are subject to the Act and either have had a sample of their DNA collected or have received notice that a sample is to be collected. The complaint alleged a host of challenges to the Act, including claims that its provisions violate several provisions of the United States and Massachusetts Constitutions. The plaintiffs' application for preliminary injunction was supported by various affidavits from experts and other individuals contesting the government's claims relating to recidivism and the accuracy of the DNA testing process, and other materials, including copies of the notices sent to the

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"(d) if personally identifiable information is removed, for a population statistics database, for identification research and protocol development purposes, or for quality control purposes."

515 Code Mass. Reg. § 2.13(1).

Most notably, the regulation limits the director's authority to disseminate information to local law enforcement agencies for identification purposes, § 2.13(1)(a), and contains no provision relating to dissemination of information for "humanitarian purposes."

[6] Hallett's conviction for unarmed robbery was reversed and a new trial ordered by this court on June 2, 1998. See *Commonwealth* v. *Hallet*, 427 Mass. 552, 559 (1998) (defendant's name spelled with one "t" as it appeared on the indictment). Under G. L. c. 22E. § 15, he must wait one year or obtain a written authorization of no further prosecution from the district attorney before moving to expunge his DNA record. Therefore, his claim is not moot.

plaintiffs regarding their obligation to provide DNA samples, newspaper articles describing the new law, information about the Federal grants available for the establishment of laboratories capable of analyzing DNA, and records of the plaintiffs' attempts to obtain State regulations, which had, at the time, not been published.

The defendants opposed the application with affidavits from experts and others and materials of their own. The defendants provided copies of the DNA database blood collection kit instruction sheet, and affidavits designed to show that, in spite of the initial absence of published regulations, the director had focused efforts on the establishment of protocols and procedures for the collection of DNA samples.

After litigation that is not relevant to resolution of the appeals, the judge granted the preliminary injunction we are concerned with, principally on the basis that the collection of DNA samples under the Act from the plaintiffs violated the prohibitions in the Fourth Amendment and art. 14 against unreasonable searches and seizures.[7] It is these grounds we

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[7] The judge also purported to support the grant of the preliminary injunction by concluding that the Act might be enforced in an arbitrary manner. He did so by taking judicial notice of another Superior Court case pending in Middlesex County, in which (according to the judge) an inmate incarcerated for a non-violent crime not enumerated in the Act is being compelled to furnish a DNA sample based on the inmate's conviction in 1985 for a violent offense which is enumerated in the Act. The judge concluded that the prisoner was not subject to the Act, and he criticized "the Commonwealth [for] seek[ing] an expansive view of the statute and its execution . . . [thereby] aggravat[ing] the dangers built into [the] statute."

The plaintiffs do not on appeal press this aspect of the judge's reasoning with any vigor. The question whether the inmate in the pending Superior Court case cited by the judge can be compelled to give a DNA sample is not before us. The judge's generally unsupported view that the Commonwealth may be acting wrongfully with respect to the inmate

now turn to, concluding that the reasoning given by the judge does not justify the grant of a preliminary injunction under either constitutional provision. We consider the question under the familiar standard governing the grant of a preliminary injunction. See *Packaging Indus. Group, Inc.* v. *Cheney,* 380 Mass. 609, 616-617 (1980). We consider as well that the Act is to be presumed constitutional, see *Tobin's Case,* 424 Mass. 250, 252 (1997), that the case is an appropriate one to consider the risk of harm to the public interest that an injunction could pose, see *GTE Prods. Corp.* v. *Stewart,* 414 Mass. 721, 723 (1993), and that, as the judge correctly noted, the remedy of a preliminary injunction "should not be grant[ed] unless [the plaintiffs] by a clear showing, carrie[d their] burden of persuasion."

2. The Act does not violate the Fourth Amendment. There is no disagreement that the involuntary collection of a blood sample from a person designated to furnish one under the Act Constitutes a "search and seizure" for purposes of the Fourth Amendment and art. 14. As has been mentioned, all fifty States have enacted DNA database statutes.[8] The appel-

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would not provide a sufficient basis to grant a preliminary injunction negating implementation of the entire Act.

[8] We have examined a number of the DNA database statutes, and find that they are, in essence, similar to the Act. Some States collect DNA samples from a more narrowly defined group of convicted persons, for example, sex offenders, See, e.g., Colo. Rev. Stat. Ann. § 17-2-201(5)(g) (West 1998) (blood sample must be given as condition of parole). Others require samples from a broader group, such as all felons, see Va. Code Ann. § 19.2-310.2 (Michie 1998), or include juveniles tried as adults, see, e.g., Idaho Code Ann. §§ 19-5501, 19-5506 (Michie 1997); Or. Rev. Stat. Ann. § 419C.473 (Michie 1995 & Supp. 1998). Louisiana has enacted a statute that will require testing of all persons arrested for a felony sex offense or other specified offense, see La. Rev. Stat. Ann. § 15:609 (West Supp. 1999) (statute effective September, 1999).

late courts that have considered Fourth Amendment challenges to such statutes have uniformly held that the involuntary collection of a blood sample under a DNA database statute from a person required to furnish one does not involve an unreasonable search and seizure. *See Boling* v. *Romer*, 101 F.3d 1336, 1340 (10th Cir. 1996); *Rise* v. *State*, 59 F.3d 1556, 1560 (9th Cir. 1995), cert. denied, 517 U.S. 1160 (1996); *Jones* v. *Murray*, 962 F.2d 302, 306 (4th Cir.), cert. denied, 506 U.S. 977 (1992); *People* v. *Wealer*, 264 Ill.

Virginia's statute was recently amended to require that a "blood, saliva or tissue" sample be taken from all persons convicted of felony offenses. See Va. Code Ann. §§ 19.2-310.2 to 19.2-310.5 (Michie 1998).

The statutes differ as to the uses to which the data may be put. For example, North Carolina states that its policy is to assist in the "identification, detection, or exclusion of individuals who are subjects of the investigation or prosecution of violent crimes against the person," and thus appears to limit dissemination of data to law enforcement officials for those crimes only. N.C. Gen. Stat. Ann. § 15A-266.1 (Michie 1997). Indiana explicitly prohibits collection or storage of DNA database records for the purpose of obtaining information about human physical traits or predisposition for disease. Ind. Code Ann. § 10-1-9-19 (West Supp. 1998). In Virginia, use of the DNA database is restricted to Federal, State, and local law enforcement officers in furtherance of an official investigation of any criminal offense, but the statute does not restrict the use of evidence for identification purposes. Va. Code Ann. § 19.2-310.5 (Michie 1998). New York allows records contained in its DNA identification database to be released to law enforcement agencies or district attorneys' offices for "law enforcement identification purposes," to assist in the recovery or identification of human remains and missing persons (provided there is an agreement relating to dissemination of the information, to a defendant in a criminal case for defense purposes, as long as the sample was obtained in connection with the case, and, after all personal identification is removed, to an entity creating or maintaining a population statistics database, or for identification research and protocol development for forensic DNA analysis or quality control purposes. N.Y. Exec. Law § 995-c(6) (West 1998).

App. 3d 6, 17 (1994); *State ex rel. Juvenile Dep't of Multnomah County* v. *Orozco.* 129 Or. App. 148, 153-154 (1994) (en banc); *State* v. *Olivas,* 122 Wash. 2d 73, 98 (1993) (en banc).[9] These decisions have proceeded on one of two approaches to Fourth Amendment analysis.

The first approach focuses on a State's interest in the identity of convicted persons. The analysis starts with the premise that convicted persons, unlike other citizens, have a diminished expectation of privacy in their identity. See *Jones* v. *Murray, supra* at 306. In *Rise* v. *State, supra* at 1560, the court said: "Once a person is convicted of [a serious crime] his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from the blood sampling." The courts using this analysis go on to examine the reasonableness of the search and seizure, and they have all concluded that the intrusion occasioned by a blood test is "not significant," involving little risk or pain. See *Jones* v. *Murray supra* at 307, quoting *Skinner* v. *Railway Labor Executives' Ass'n,* 489 U.S. 602, 625 (1989). The courts point to other mandatory blood tests which have been upheld, saying that such tests "can be reasonable under the Fourth Amendment, even with respect to free persons, where the slight intrusion is outweighed by the governmental interest advanced by the intrusion." See *Jones* v. *Murray, supra,* and cases cited. *See Skinner* v. *Railway Labor Executives' Ass'n, supra* (upholding drug and alcohol tests of railroad employees for safety reasons). See also *Dunn* v. *White,* 880 F.2d 1188, 1196-1197

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[9] Two United States District Court decisions have also rejected Fourth Amendment challenges to prisoner DNA database statutes. See *Kruger* v. *Erickson,* 875 F. Supp. 583, 588-589 (D. Minn. 1995), affd, 77 F.3d 1071 (8th Cir. 1996); *Ryncarz* v. *Eikenberry,* 824 F. Supp. 1493, 1498-1499 (E.D. Wash. 1993).

(10th Cir. 1989), cert. denied, 493 U.S. 1059 (1990) (upholding blood tests on prisoners to detect HIV). The courts then engage in a balancing test, weighing the government's strong interest in preserving an identification record of convicted persons for resolving past and future crimes,[10] against the minor intrusion into their diminished privacy right in their identities by the taking of a DNA sample. See *Jones* v. *Murray, supra* at 307. The courts conclude that the high government interest in a particularly reliable form of identification outweighs the minimal intrusion of a pin prick. See *id.*

The other approach that has been used to justify taking of blood from convicted persons for DNA identification analysis is that discussed in *State* v. *Olivas, supra* at 93, where the court rejected a Fourth Amendment challenge to DNA blood testing, because "special needs beyond law enforcement" existed. The court in *Olivas* justified a search and seizure for DNA under that exception to the warrant requirement of the Fourth Amendment. See *id.* at 88-89, citing *Skinner* v. *Railway Labor Executives' Ass'n, supra* at 620-621 (government has "special need" "to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs"). Under this analysis, the establishment of a DNA databank is considered a deterrent to recidivism on the part of convicted persons, and, therefore, suspicionless blood testing is justified because it serves a special need beyond "normal" law enforcement. See *Olivas, supra* at 93.

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[10] In support of this point, the courts often point to documented evidence of high rates of recidivism among certain types of felons and sex offenders, and the fact that homicides, sexual offenses, and other crimes are more likely to produce certain evidence from which DNA information can be derived, such as blood, semen, hair, or saliva. See *Rise* v. *State*, 59 F.3d 1556, 1561 (9th Cir. 1995).

In consideration of the Fourth Amendment, the judge rejected the defendants' arguments relating to the balancing or special needs modes of analysis. Instead, he relied on *Schmerber* v. *California*, 384 U.S. 757, 768 (1966) (involving involuntary blood test taken at hospital after automobile accident to determine whether arrested suspect was under influence of alcohol), and *Winston* v. *Lee*, 470 U.S. 753, 761 (1985) (involving attempt to compel charged suspect to undergo surgical procedure to remove bullet from his collarbone), which state that, when the search and seizure involve an involuntary blood test, probable cause is a threshold requirement.

The holdings in the *Schmerber and Winston* decisions, however, must be understood in the context of Fourth Amendment analysis which considers the nature of the involved person's reasonable expectation of privacy. Neither case involved a situation where the person subject to testing or a medical procedure had been convicted of a crime. Further, neither case contemplated a situation where the bodily intrusion occurred simply for the purpose of adding to a record of identity and not to search for evidence of a crime. If a convicted person has a low expectation of privacy in his identity by reason of the taking and storing of fingerprints, photographs, and other criminal records, then the privacy interests which trigger the assumption that probable cause or individual suspicion is needed to amplify a record of identification by a nonharmful procedure are eliminated. In this context, the *Schmerber and Winston* requirements of probable cause and a search warrant are simply inapplicable, as long as the DNA sample is taken from a convicted person for identification purposes only.

We have recognized that "[t]he maintenance of fingerprint, photograph and arrest records serves an important law

enforcement function." *Commonwealth* v. *Shipps*, 399 Mass. 820, 832 (1987), quoting *Police Comm'r of Boston* v. *Municipal Court of the Dorchester Dist.*, 374 Mass. 640, 655 (1978). We have also stated that "arrest records serve 'as a means for identification and apprehension of criminals.'" *Police Comm'r of Boston* v. *Municipal Court of the Dorchester Dist., supra* at 655, quoting, *Morrow* v. *District of Columbia*, 417 F.2d 728, 748 (D.C. Cir. 1969) (Tamm, J., dissenting in part). The State has an established and indisputable interest in preserving a permanent identification record of convicted persons for resolving past and future crimes, and uses fingerprints, and now will use DNA identification, for these purposes. The obtaining of a very small amount of blood by pin prick constitutes only a minimally intrusive search. See *Skinner, supra* at 625 (does not "infringe significant privacy interests"); *Winston, supra* at 762 (not an "unduly extensive imposition"); *Schmerber, supra* at 771 ("commonplace"). The balance of interests clearly weighs in favor of the use of DNA in accordance with the Act to create a record of identification.

We need not discuss the judge's other reasoning[11] or the "special needs" analysis. We conclude, under the first ap-

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[11] The judge rejected the argument that a bodily intrusion can be minimal in some circumstances, stating that the "United States Supreme Court has *never held* that a bodily intrusion can occur without at least individualized suspicion, if not probable cause, of criminal activity and a clear indication that such intrusion will provide probative evidence connecting the defendant to said activity" (emphasis in original). While this may be so, it is also true that the Supreme Court has never held that there must be particularized probable cause or suspicion to justify gathering and retaining a permanent record of a convicted person's identity. If that were so, then suspects' fingerprints and photographs would have to be discarded after their initial evidentiary and identification purposes had been served. The need for DNA information is like the need for finger-

proach discussed above, that the Act does not violate the Fourth Amendment. "We do not [necessarily] rely on any supposition that [convicted persons] are more likely to be recidivists than others, nor . . . on the penological interests within the prison. We do rely upon the specific relevance of DNA evidence to prove [serious crimes]. Thus we hold that while obtaining and analyzing the DNA [under the Act] is a search and seizure implicating Fourth Amendment concerns, it is a reasonable search and seizure. This is so in light of [a convicted person's] diminished privacy rights . . . the minimal intrusion of . . . blood tests; and the legitimate government interest in the investigation and prosecution of unsolved and future criminal acts by the use of DNA in a manner not significantly different from the use of fingerprints." (Footnote and citation omitted.) *Boling* v. *Romer, supra* at 1340.

3. Article 14 may not be construed in any principled way to conclude that, with regard to the Act, the plaintiffs possess greater rights under the State Constitution than those granted by Federal decisions interpreting the Fourth Amendment.

As is the case with the Fourth Amendment, a warrantless search and seizure violates art. 14 only if it is unreasonable. See *Commonwealth* v. *Shields,* 402 Mass. 162, 164 (1988); *Commonwealth* v. *Sheppard,* 394 Mass. 381, 391 (1985). Under art. 14, we "determin[e] reasonableness . . . by balancing the need to search [or seize] against the invasion which the search [or seizure] entails." *Commonwealth* v. *Shields, supra,* quoting *Commonwealth* v. *Silva,* 366 Mass.

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prints and photographs. This context is entirely different from the context of the cases from which the judge drew his conclusions. The bodily intrusion is minimal, and its only purpose is for identification; the blood test is not a "fishing expedition" for incriminating evidence of a crime.

402, 405 (1974). The State must produce a particularized reason for the need for such searches and seizures, see *Guiney* v. *Police Comm'r of Boston*, 411 Mass. 328, 331-332 (1991) (*Guiney*), which outweighs the degree of invasiveness occasioned by the its action. See *Commonwealth* v. *Shields*, *supra* at 165.

Inherent in this balancing test, which approximates the Fourth Amendment test previously discussed, is the measure of the expectation of privacy of the person subject to the search and seizure. A privacy interest is protected under art. 14, when, as is the case under the Fourth Amendment, "it is shown 'that a person [has] exhibited an actual (subjective) expectation of privacy,' and when that 'expectation [is] one that society is prepared to recognize as "reasonable."' *Katz* v. *United States*, [389 U.S. 347, 361 (1967)] (Harlan, J., concurring)." *Commonwealth* v. *Blood*, 400 Mass. 61, 68 (1987). A statute, or other rule or regulatory provision, is unlikely to be found constitutional under art. 14, if it invades an area in which the targeted person has a high expectation of privacy, even if the search and seizure is, for the sake of argument, minimally intrusive.

There are three relevant decisions in this area where we have examined, under art. 14, provisions which involved the search and seizure of persons not suspected of a crime. In *Commonwealth* v. *Shields*, *supra* at 167, where we upheld against an art. 14 challenge suspicionless searches and seizures under G. L. c. 90, § 24, which authorized drunk driving roadblocks, we said, "[the] constitutionality [of roadblock seizures] is based in large measure on the lower expectation of privacy traditionally accorded to the motoring public." After determining the level of privacy persons subject to the statute might reasonably expect, we applied the balancing test. We concluded that the "strong State interest in elimi-

nating '[t]he carnage caused by drunk drivers,'" *Commonwealth* v. *Shields, supra* at 167 n.3, quoting *South Dakota* v. *Neville,* 459 U.S. 553, 558 (1983), outweighed the intrusion of the limited search and seizure that a roadblock involved.

In Horsemen's Benevolent & Protective Assn, Inc. v. *State Racing Commn,* 403 Mass. 692, 706 (1989) (*Horsemen's*), we applied art. 14 to strike down a regulation which required random suspicionless drug testing (by means of monitored urine samples) of State racing commission licensees. We rejected the notion, accepted by other jurisdictions, that persons involved in highly regulated industries, such as horse and dog racing, should, as a matter of course, have a reduced expectation of privacy in all respects.[12] Instead, we "focuse[d] on an individual's reasonable expectations of privacy which are not necessarily dependent on the amount of regulation in a particular industry." *Horsemen's, supra* at 703. In the *Horsemen's case,* we determined that, while the racing industry was highly regulated, the regulations could not diminish the expectation of privacy that a licensee had in urinating in monitored circumstances and in the information that could be extracted from the urine sample. *Id.* at 704. In light of the fact that privacy expectations were not diminished, in order for the balancing test to succeed, the State's interest would need strongly to outweigh the intrusion pre-

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[12] We pointed out that most instances where this theory has been upheld have involved industries relating to security and public safety. See *Horsemen's Benevolent & Protective Ass'n, Inc.* v. *State Racing Comm'n,* 403 Mass. 692, 702 (1989), citing *National Treasury Employees Union* v. *Von Raab,* 816 F.2d 170, 179-180 (5th Cir. 1987), aff'd in part and rev'd in part, 489 U.S. 656 (1989) (analogizing customs service officials to a high regulated industry); *McDonell* v. *Hunter,* 809 F.2d 1302, 1308 (8th Cir. 1987) (corrections officers); *Rushton* v. *Nebraska Pub. Power Dist.,* 653 F. Supp. 1510, 1524-1525 (D. Neb. 1987), aff'd, 844 F.2d 562 (8th Cir. 1988) (nuclear power plant employees).

cipitated by the test. In the *Horsemen's* case, we concluded that the highly intrusive test outweighed the State's interest in deterring the use of illegal drugs at State racetracks. *Id.* at 705.

In the *Guiney* case, *supra*, which involved a police department rule requiring drug testing of Boston police officers, we assumed, without discussion, that, as in the *Horsemen's* case, 'the police officers subjected to the search had a reasonable expectation of privacy in the contents of their urine or blood. *Guiney, supra* at 332. We then determined, after considering art. 14, that the Boston police commissioner had failed to carry the government's burden of persuasion, because the governmental need was not adequately compelling or concrete, in the absence of some reasonable showing that there was an existent drug problem in the Boston police department. See *id.*

We are concerned in this case with convicted persons who have a low expectation of privacy in their identity, and a new, and validated, technology which can, by means of a properly performed minimally invasive test, obtain and preserve an extremely accurate record of identification. The circumstances here most closely resemble those in the *Shields* case. The minor intrusion of a blood test is outweighed by the strong State interest in preserving a positive recorded identification of convicted persons. Our constitutional analysis under art. 14 parallels the conclusion reached by the Federal courts in decisions applying the balancing of interest analysis under the Fourth Amendment.[13]

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[13] The decisions in *Matter of Lavigne*, 418 Mass. 831 (1994), and *Matter of a Grand Jury Investigation*, 427 Mass. 221, cert. denied sub nom. *A.R.* v. *Massachusetts*, 119 S. Ct. 171 (1998), are not helpful to the resolution of the art. 14 issue. Both of these cases concerned the acquisition of DNA blood samples where a reasonable basis in fact existed to

4. The plaintiffs argued to the judge that, before the Act could take effect, it was necessary for the director to promulgate specific regulations to spell out when and how reasonable force could be used under § 4 (*a*) of the Act to acquire DNA samples from nonconsenting persons. The judge was not required to rule on the point because of the procedural posture of the case at the time the preliminary injunction entered. The fact that the injunction cannot be supported on the constitutional grounds discussed will inevitably lead to the plaintiffs' reassertion of their argument concerning the need for regulations in connection with the reasonable force provision as they pursue a new preliminary injunction. We decide the issue now.[14]

The plaintiffs base their argument on the premise that, in the absence of regulations, the use of force to collect a DNA sample will create a substantial danger of contamination and misidentification of collected samples. In support of this contention, the plaintiffs refer to an affidavit from a biochemist with expertise in DNA testing that the collection of uncontaminated blood samples is a "critical step" in ensuring against unreliable DNA analysis and consequent erroneous identification. This, of course, is a self-evident proposition.

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conclude that the persons in question had committed a crime. Here, the collection identification information under the Act has a generalized purpose, unconnected to an immediate criminal investigation, and thus proceeds in the manner associated with fingerprinting and the collection of similar information from a person who lawfully comes under the State's authority to maintain a record of that person's identification.

[14] In so doing, we reject the plaintiffs' argument that this aspect of the case is moot. See *Reproductive Rights Network* v. *President of the Univ. of Mass.*, 45 Mass. App. Ct. 495, 500 (1998); *Asycough* v. *Andover*, 19 Mass. App. Ct. 125, 127-128 (1984).

The Act is ambiguous concerning the need for regulations in connection with the reasonable force provision.[15] Section 4 *(a)* distinguishes between those who are to collect DNA samples[16] and those who are to assist in the collection process by using reasonable force to compel a sample from a person refusing to give one.[17] The existing regulations contain extensive provisions designed to ensure the integrity of the collection process and to avoid the risk of contamination. The Department of Correction has regulations defining when, and in what manner, reasonable force may be used against inmates. See 103 Code Mass. Regs. § 505.06-505.07 (1998). These regulations define what "force" is; differentiate between "[e]xcessive" and "[r]easonable [f]orce"; further define the circumstances when reasonable force may be used; provide that a command is to be used, in the absence of an emergency, before reasonable force is applied to an inmate; and require that, after the use of any force, the inmate is to undergo a prompt medical examination. See 103 Code Mass. Regs. § 505.06-505.07. We may further assume that law enforcement and correction personnel take precautions (such as using protective gloves) before dealing with inmates or others in a medical setting requiring the use of reasonable force.

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[15] For example, G. L. c. 22E, § 4 *(a)*, the provision detailing collection methods, states that "[t]he director may establish regulations or proceedings for the collection of DNA samples . . . ." However, in § 6, which outlines the duties of the director under the Act, it says, "[t]he director shall promulgate regulations governing the collection, submission, receipt, identification, storage and disposal of DNA samples."

[16] The persons identified as "collectors" of DNA samples are limited to "a physician, registered professional nurse, licensed practical nurse, phlebotomist, health care worker with phlebotomist training or a person licensed and trained by the director." G. L. c. 22E, § 4 *(a)*.

[17] The persons who may assist in collecting DNA samples are "[d]uly authorized law enforcement and correction personnel. G. L. c. 22E, § 4 *(a)*.

We believe those assisting in the collection of DNA samples under the Act know, or should know, what reasonable force is, and when and how it may be used. The term is defined in regulations of the Department of Correction, and can be considered to be a familiar concept, on which training has been given, to law enforcement and correction personnel. The regulations and protocols concerning collection of DNA samples set out procedures designed to collect blood in a medically sound and sanitary manner. The law does not require the director to promulgate regulations detailing how law enforcement and correction personnel should act in specific situations in complying with the Act. Undoubtedly, it is in the interest of the efficacy of the database required by the Act that each DNA sample, whether compelled or voluntary, be obtained under medically pristine conditions. State officials involved with the Act should be well aware that an effort to use a DNA record from the database either to identify a suspect or to establish his innocence (or for any other reason) will inevitably be challenged on the ground (among others) that the DNA sample was not properly obtained or that it had been contaminated with other human DNA, creating a possible misleading or false result. See *Commonwealth* v. *Vao Sok,* 425 Mass. 787, 794 n.11 (1997) (pointing out the possibility of contamination of a forensic DNA sample and further describing problems that might exist with certain types of DNA testing). Regulations governing the use of reasonable force by those assisting in the collection of DNA samples are neither mandated by the Act nor otherwise necessary to its implementation. The grant of a preliminary injunction would not be warranted on this ground.

5. The plaintiffs, and other interested parties who have filed briefs, have understandably raised questions concerning the possibility that those who have submitted DNA samples

under the Act may suffer a violation of privacy, if DNA information about them is disclosed for a purpose other than identification. We briefly discuss some of these concerns.

The DNA analysis that the Act allows to be performed on the blood samples, and the limited distribution of the information, should eliminate fears about wrongful privacy disclosures that might otherwise arise. While technological advances have made it possible to discover from minute blood samples genetic and medical information of a most invasive and personal nature, the STR testing process, and the restricted purpose for which a blood sample obtained under the Act may be tested, provides safeguards against wrongful use of the resulting information. We are told that STR testing avoids the acquisition of general genetic information, and that STR loci are "particularly appropriate for forensic use," in part because they can be "noncoding regions and therefore can be expected to be selectively neutral." National Research Council, The Evaluation of Forensic DNA Evidence 117 (1996). Further, even if the loci tested could reveal genetic information, the Act confines the use of the samples to a DNA analysis which generates on "*numerical identification information*" (emphasis added). G. L. c. 22E, § 1. In most cases, only the resulting "DNA record," which contains the numerical identification information derived from the samples by the analysis, may be distributed. See G. L. c. 22E, § 10.[18] In addition, the Act limits the purposes for which the

[18] General Laws c. 22E, § 10 (a), orders the director to distribute "records in his possession, including DNA records and analysis, to police departments in cities and towns, to the department, to the department of correction, to a sheriff's department, to the parole board or to prosecuting officers within the commonwealth upon request in writing or electronically." It is not clear what "records," other than DNA records, the director would have in his possession, and why this subsection, unlike the rest of § 10, allows the distribution of both DNA records and DNA analyses.

DNA records may be distributed, and does not permit dissemination of the DNA samples themselves. The Act also imposes criminal sanctions on anyone who "purposely discloses" or "willfully obtains" DNA information without proper authorization. G. L. c. 22E, §§ 12, 13. The plaintiffs assert that § 10 *(c)-(d)* of the Act, which compels disclosure of the records to comply with Federal statutory or grant obligations, and allows disclosure of records for various scientific or humanitarian purposes,[19] may somehow lead to leakage of complete genetic profiles.[20] Their speculation that data may be used wrongfully is contrary to the language of the Act and concerns provisions that are not before us.

Nor is it clear to us why this subsection, contrary to the others, does not restrict the purpose for which the listed departments may receive such information. We rest on the assumption that, because an analysis and record, by definition, may only consist of "numerical identification information," derived from a DNA sample, a department's request for any reason cannot reveal other private and protected information.

[19] The regulations are more restrictive than the Act itself and they do not authorize release of records for "humanitarian purposes." G. L. c. 22E, § 10 (*d*). See note 5, *supra*.

[20] When promulgating final regulations for the Act, the director may want to provide more detail as to tests that may be performed on the DNA samples that are being collected and stored. While the Act only authorizes use of those portions of DNA samples that are relevant for identification purposes, the indefinite storage of the entire DNA sample, see 515 Code Mass. Regs. § 1.05(4), creates some concern that the samples could be misused at some point in the future to search for and disclose private genetic information.

6. The preliminary injunction entered in the Superior Court is vacated, and the case is remanded to that court for further proceedings consistent with this opinion.

So ordered.

APPENDIX B.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 98-462

DONALD E. LANDRY, et al,[1]

vs.

SCOTT HARSHBARGER,
ATTORNEY GENERAL, et al.[2]

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' SECOND MOTION FOR PRELIMINARY INJUNCTION

This matter comes before the Court on plaintiffs', Donald E. Landry, et al. ("plaintiffs"), second motion for preliminary injunction. Plaintiffs have moved to enjoin the defendants, Scott Harshbarger, Attorney General, et al. ("defendants"), from enforcing the DNA Seizure and Dissemination Act, M.G.L. c. 22E §§ 1-15, ("Act"). Plaintiffs

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[1] Miriam Cartagena, probationer; Albert Troisi, probationer; William Pistorino, Massachusetts citizen; John Hallett, prisoner; Vincent Gallello, prisoner; and Geoffrey Pironti, prisoner.

[2] David Ranieri, Director, State Crime Laboratory; Reed Hillman, superintendent, Department of State Police; Sheila Hubbard, Chairperson, Massachusetts Parole Board; Michael Maloney, Commissioner, Department of Corrections; and John O'Brien, Commissioner of Probation.

also seek a declaration that the Act violates the plaintiffs' constitutional rights on the grounds that the involuntary extraction of blood, with or without the use of force, without individualized suspicion or probable cause is incompatible with individual privacy tights guaranteed by art. 14 of the Massachusetts Declaration of Rights and the Fourth and Fourteenth Amendments to the United States Constitution. In their opposition, in support of the Act's constitutionality, defendants urge this Court to depart from clearly established Fourth Amendment and art. 14 jurisprudence and create new law. For the Court to accept defendants' position, it would be adopting a new interpretation of firmly established jurisprudence. This Court will not adopt this new and novel approach. Rather, this Court finds and declares that M.G.L. c. 22E §§ 1-15 violates the Fourth Amendment to the United States Constitution; independent of and apart from the Fourth Amendment, these provisions also violate art. 14 of the Declaration of Rights. For the reasons set forth below, plaintiffs' second motion for preliminary injunction is **ALLOWED**.

I. BACKGROUND

On September 30, 1997, the Massachusetts Legislature enacted the DNA Seizure and Dissemination Act, M.G.L. c. 22E §§ 1-15. According to 1997 Mass. Acts c. 106 § 1, the purpose of the Act is to assist local, state, and federal criminal justice and law enforcement agencies in: (1) deterring and discovering crimes and recidivistic criminal activity; (2) identifying individuals for, and excluding individuals from criminal investigation or prosecution; and (3) searching for missing persons.

Pursuant to Section 3 of the Act, any person convicted of one of the thirty-three (33) enumerated statutory offenses[3] or of an attempt or a conspiracy to commit any of the aforementioned offenses shall be required to submit a DNA sample within ninety (90) days of such conviction. According to 1997 Mass. Acts c. 106, § 8, on the effective date of the Act, December 29, 1997, notwithstanding the date of conviction, any person incarcerated in any prison or house of correction for any of the enumerated offenses, or any person on probation or parole as a result of any of the enumerated offenses, shall submit to a DNA sample within ninety (90) days, or prior to their release from custody, whichever date occurs first.

According to Section 3 of the Act, each DNA sample shall be collected by an authorized person, in accordance with regulations or procedures established by the director. Section 6 of the Act, further specifies that the director *shall promulgate regulations* governing the collection, submission, receipt, identification, storage, and disposal of DNA

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[3] The Act applies to the following thirty-three statutory criminal offenses: murder, manslaughter, indecent assault and battery on a mentally retarded person, indecent assault and battery on a person over 14, mayhem, assault with intent to murder, attempt to murder by poisoning, armed robbery, armed assault with intent to rob, armed assault in a dwelling, use of a firearm during commission of a felony, home invasion, rape, rape of a child under 16, statutory rape, assault with intent to rape, assault with intent to rape a child under 16, kidnapping, armed burglary in the nighttime with intent to commit a felony, unarmed burglary in the nighttime, abduction for the purpose of prostitution, administering drugs with intent to rape, inducing a minor to become a prostitute, deriving support from child prostitution, open and gross lewdness, incest, dissemination of obscenity, solicitation of child pornography, dissemination of child pornography, unnatural and lascivious acts, unnatural and lascivious acts with a child under 16, and prostitution.

samples. The results of all DNA analyses shall become part of the state DNA database.

In the event that an individual refuses to submit to a DNA sample, Section 4 allows authorized law enforcement and correction personnel to use reasonable force to assist in collecting DNA samples. Additionally, Section 11 permits the imposition of a fine of not more than $1,000, or imprisonment in a jail or house of correction for not more than six months, or both for anyone who refuses to provide a DNA sample.

In January of 1999, defendants and their agents began to enforce the Act, without promulgating regulations, in violation of the Act's requirements. Between January 15 and January 22, 1998, plaintiffs Cartagena, Troisi, and Pistorino received notices from the Department of Probation informing them of their duty to provide a DNA sample within ninety (90) days of their convictions. The notices threatened that failure to comply was punishable by a fine, incarceration, or both, and was grounds for the revocation of their probation. On January 26, 1998, Landry received a similar notice stating that he must submit to a DNA sample by March 29, 1998. All probationers and parolees were instructed to contact 1-888-977-4DNA for further instructions and information.

On January 24, 1998, prior to the promulgation of any regulations, agents of the defendants compelled more than 1,100 prison inmates, convicted of one or more of the enumerated offenses, to submit to the extraction of their DNA, including plaintiffs Gallello, Hallett, and Pironti. When necessary, defendants used physical force, threat of force, or threat of punishment to involuntarily obtain DNA samples from the prison inmates.

Beginning on February 4, 1998, agents of defendants began extracting DNA samples from probationers and parolees at the Massachusetts National Guard Armory in Dorchester (Armory). Probationers and parolees who received notice and telephoned 1-888-977-4DNA were instructed, under threat of punishment, to report to the Armory to submit a DNA sample.

II. PROCEDURAL HISTORY

On February 5, 1998, at a hearing before this Court, plaintiffs argued a Motion for Preliminary Injunction in an effort to enjoin the defendants from seizing the DNA of Cartagena, Landry, Troisi, and Pistorino, to enjoin any testing of the DNA samples previously seized from Pironti, Hallett, and Gallello, and to order that any seized DNA be destroyed. By agreement of all parties, the only issue raised and argued on February 5 was the defendants' failure to promulgate regulations prior to enforcement of the Act, in violation of Sections 6 and 8 of M.G.L. c. 22E. This Court granted plaintiffs' motion on February 9 and ordered defendants to cease any and all collection, analysis, and/or dissemination of DNA of the plaintiffs, and of anyone subject to the provisions of the Act.

On February 17, 1998, plaintiffs filed an amended verified complaint in this Court seeking temporary and permanent injunctive and declaratory relief.[4] Plaintiffs are seeking to

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[4] Count I of plaintiffs' complaint alleges an unreasonable invasion of bodily integrity and personal privacy in violation of articles 1, 10, and 12 of the Massachusetts Declaration of Rights and the Ninth and Fourteenth Amendments to the United States Constitution. Count II alleges an unreasonable search and seizure in violation of article 14 of the Massachusetts Declaration of Rights and the Fourth and Fourteenth Amendments

permanently bar the defendants from seizing the DNA of Cartagena, Landry, Troisi, and Pistorino, and from analyzing and disseminating the DNA samples previously seized from Pironti, Hallett, and Gallello. Plaintiffs are also seeking a declaration that defendants' actions violate the constitutional rights of the plaintiffs.

On February 27, 1998, after promulgating emergency regulations governing just the collection of DNA samples, defendants filed an Emergency Motion to Partially Vacate the Preliminary Injunction entered on February 9, 1998 and allow them to resume collecting DNA samples. On March 18, 1998, after a hearing before me, I denied defendants' emergency motion on the grounds that further arguments and/or regulations regarding the use of force were desired. These issues were scheduled to be addressed at oral arguments on April 15, 1998.

On March 26, 1998, a single justice of the Massachusetts Appeals Court modified the preliminary injunction issued on February 9 and reaffirmed on March 18. Justice Kenneth Laurence of the Massachusetts Appeals Court granted defendants' motion to vacate that portion of the injunction barring the collection of DNA samples. Defendants are currently permitted to notify any and all persons subject to the Act of their duty to provide a DNA sample and to inform such persons that the refusal to do so shall be subject to the penalties of fine and term of imprisonment set forth in Section 11 of

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to the United States Constitution. Count III alleges unequal protection of the laws in violation of articles 1, 10, and 12 of the Massachusetts Declaration of Rights and the Fourteenth Amendment to the United States Constitution. Count IV alleges double jeopardy in violation of articles 1, 10, and 12 of the Massachusetts Declaration of Rights and Article, Section Ten of the United States Constitution and the Fourteenth Amendment to the United States Constitution. Count VI alleges a violation of the fundamental requirements of the Act itself.

the Act. Defendants are further permitted to collect DNA samples, however, in the event that any person should unequivocally and clearly, in writing, refuse to provide a DNA sample, defendants shall not use physical force of any nature to obtain a DNA sample.

On April 22, 1998, all parties appeared before this Court for oral arguments. By agreement, the parties' arguments concentrated on the merits of Count II of plaintiffs' amended complaint, the constitutionality of the Act with respect to art. 14 of the Massachusetts Declaration of Rights and the Fourth and Fourteenth Amendments to the United States Constitution. This is the issue currently before this Court, and arguments on plaintiffs' other Counts have been reserved for a later date.

III. STANDARD OF REVIEW

In determining whether to grant a preliminary injunction, this Court considers the balancing test set forth in Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609, 616-617 (1980). See also Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue, 406 Mass. 701, 710 (1990). First, the Court must evaluate, in combination, "the moving party's claim of injury and its chance of success on the merits." Cheney, 609 Mass. at 617. If failing to issue the injunction "would subject the moving party to a substantial risk of irreparable harm, this Court must then balance this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party." Id. "In the context of a preliminary injunction, the only rights which may be irreparably lost are those not capable of vindication by a final judgment, rendered either at law or in equity." Id.

at 617 n.11. Moreover, in appropriate cases the Court should also consider the risk of harm to the public interest. GTE Prods. Corp. v. Stewart, 414 Mass. 721, 723 (1993). See also Commonwealth v. Massachusetts, CRINC., 392 Mass. 79, 89 (1984); Biotti v. Board of Selectmen of Manchester, 25 Mass. App. Ct. 637, 640 (1988). Finally, a preliminary injunction is a drastic remedy that a court should not grant unless the movant, by a clear showing, carries its burden of persuasion. Charles Wright & Arthur Miller, 11 Federal Practice & Procedure, § 2948, at 129-130 (1995).

Mass. R. Civ. P. 65(b)(2) permits a hearing on an application for a preliminary injunction to be consolidated with a trial on the merits. A consolidated hearing and trial should be conducted in circumstances that can produce a clear indication of the factual basis for the judge's decision. Metropolitan Dist. Comm'n v. Codex Corp., 395 Mass. 522, 524-525 (1985). Moreover, in order for the granting or denial of preliminary injunctive relief to be outcome-determinative, there must exist the necessity of a prompt judgment rather than a preliminary injunction. Carabetta Enters., Inc. v. Schena, 25 Mass. App. Ct. 389, 391-392 n.1 (1988). The showing of exigency must be compelling to justify giving the case preference over others already awaiting trial. Id.

IV. DISCUSSION

A. The Fourth Amendment to the United States Constitution

The Fourth Amendment to the United States Constitution expressly provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

Fourth Amendment jurisprudence has consistently recognized and protected, "'expectations of privacy,' see Katz v. United States, 389 U.S. 347 (1967) -- the individual's legitimate expectations that in certain places and at certain times he has the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men.'" Winston v. Lee, 470 U.S. 753, 758 (1985) (citing Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

The initial question to address under a Fourth Amendment analysis is whether the government's conduct constitutes a search and/or a seizure. The United States Supreme Court has consistently held that a seizure occurs when the government, in seeking to obtain evidence from an individual, meaningfully interferes with that individual's "freedom of movement." Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 616 (1989) (citing INS v. Delgado, 466 U.S. 210, 215 (1984); United States v. Jacobsen, 466 U.S. 109, 113 n.5 (1984)). Correspondingly, obtaining and examining evidence from an individual constitutes a search "if doing so infringes an expectation of privacy that society is prepared to recognize as reasonable." Id. (citing California v. Greenwood, 486 U.S. 35, 43 (1998); Jacobsen, 466 U.S. at 113). In the present case, this Court finds that the involuntary taking of a person's blood, to obtain a DNA sample, clearly constitutes a search that triggers the protections of the Fourth Amendment.

The United States Supreme Court previously considered precisely the same issue and concluded that "[blood] testing procedures plainly constitute searches of 'persons,' and depend antecedently upon seizures of 'persons,' within the meaning of that Amendment." Schmerber v. California, 384 U.S. 757, 767 (1966) (involuntary blood test taken at hospital, after an automobile accident, to determine whether the

arrested suspect was under the influence of alcohol). Moreover, defendants do not dispute such findings, as they conceded, at oral argument and in their opposition, that their procedures constitute a Fourth Amendment search.

Once a search and/or seizure has triggered Fourth Amendment protections, a determination must be made as to the reasonableness of the government's search. "The Fourth Amendment's proper function is to constrain, not against all intrusions [into the body for blood], but against intrusions which are not justified in the circumstances, or which are made in an improper manner." Id. at 768.

In Winston v. Lee, 470 U.S. 753, 760 (1985) (attempt to compel a charged suspect to undergo a surgical procedure to remove a bullet from his collarbone), the United States Supreme Court reaffirmed the test for reasonableness set forth in Schmerber and "noted the importance of probable cause" as a threshold requirement. The Court reemphasized that "[s]earch warrants are ordinarily required for searches of dwellings, and, absent an emergency, *no less could be required* where intrusions into the human body are concerned. . . ." Winston, 470 U.S. at 761 (emphasis added) (quoting Schmerber, 384 U.S. at 770). "In the absence of a *clear indication* that in fact such evidence will be found . . . fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search." Schmerber, 384 U.S. at 769 (emphasis added). Without meeting the threshold requirement of probable cause, there cannot be a bodily intrusion.

Apart from this initial inquiry, the Schmerber Court also applied a balancing test to determine the reasonableness of the procedure employed. The Court considered both the circumstances surrounding the procedure (i.e. where the procedure was performed, who performed the procedure, and the

procedural method utilized) and the "extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity." See Winston, 470 U.S. at 761; see also Schmerber, 384 U.S. at 771. On the other hand, the Court "weighed against these individual interests . . . the community's interest in fairly and accurately determining guilt or innocence." Winston, 470 U.S. at 762.

In Schmerber, after determining that probable cause existed, the Court held the procedure employed was not unduly burdensome on the defendant, given that the procedure was performed by a physician, in a hospital environment, and in accordance with accepted medical practices. The Court further noted that "blood test procedure[s have] become routine in our everyday life." Schmerber, 384 U.S. at 770, n.13. In Winston, the Court did not allow the surgical procedure on the grounds that "the intrusion on respondent's privacy interest entailed by the operation can only be characterized as severe." 470 U.S. at 767. Again, however, for the purposes of the present case, it is essential to note that in both Schmerber and Winston, it was undisputed that the police had probable cause to believe the defendant had committed a crime and to believe that the bodily intrusion "would provide evidence that was *exceptionally probative* in confirming this belief." Winston, 470 U.S. at 759 (citing Schmerber, 384 U.S. at 368, 770) (emphasis added). The Court's determination as to the reasonableness of each search was made only after the initial requirement of probable cause was satisfied.

In the case before me, it is undisputed that the Act does not require a preliminary determination of individualized probable cause or reasonable suspicion of criminal activity prior to the forced taking of blood from any person subjected to the provisions of the Act. The Act provides for a random, suspicionless bodily intrusion to obtain a blood sample from

any person convicted of one or more of the 33 enumerated criminal offenses. Additionally, defendants do not dispute that probable cause is ordinarily required to permit a bodily intrusion to obtain evidence. The defendants, however, insist that those requirements do not apply to the Massachusetts statute before me. Defendants rely on Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 448-450 (1990) (highway sobriety checkpoint was held consistent with the Fourth Amendment); Skinner, 489 U.S. at 634 (permitting drug and alcohol tests for railway employees involved in train accidents and for those who violate particular safety rules); and National Treasury Employees Union v. Von Raab, 489 U.S. 656, 677 (1989) (permitting drug tests for United States Customs Service employees who seek transfer or promotion to certain positions), to assert that no individualized suspicion is required when the intrusion is minimal and is justified by important governmental interests, generally when the government determines that requiring individualized suspicion would defeat a legitimate law enforcement purpose. Defendants suggest that under such limited circumstances, this court need only consider the state's interest in conducting the suspicionless search, the effectiveness of the method chosen to carry out the search, and the level of intrusion on the individual's privacy.

Defendants' assertions are inconsistent with Fourth Amendment jurisprudence. The United States Supreme court has *never held* that a bodily intrusion can occur without at least individualized suspicion, if not probable cause, of criminal activity and a clear indication that such intrusion will provide probative evidence connecting the defendant to said activity. In fact, the United States Supreme Court has uniformly held that the Fourth Amendment "generally bars officials from undertaking a search or seizure absent [some

form of] individualized suspicion." Chandler v. Miller, 117 S. Ct. 1295, 1298 (1997) (holding that mandatory drug testing of candidates for state office did not fit within the closely guarded category of constitutionally permissible suspicionless searches).

If this Court were to follow the arguments of the defendants and eliminate the Fourth Amendment's threshold requirement of probable cause, this Court would need to change the existing laws governing Fourth Amendment jurisprudence, and would thereby not only exceed its authority, but adopt a rule that is new, extensive and unjustified under any analysis of constitutional doctrine. Naturally, as there is "no justification for this unprecedented departure from settled Fourth Amendment jurisprudence," the Court is unwilling to take such a position. Rise v. State of Oregon, 59 F.3d 1556, 1564 (9th Cir. 1995) (Nelson, J., dissenting), cert. denied, 116 S. Ct. 1554 (1996).

Moreover, defendants' reliance on Sitz is misplaced. In Sitz, the United States Supreme court considered the extent of the intrusion, both subjective and objective, in stopping motorists at a predetermined sobriety checkpoint for approximately twenty-five seconds, in order to determine whether further sobriety testing was warranted. Sitz, 496 U.S. at 448-449. The Court then balanced this intrusion with the state's interest in preventing drunk driving accidents and the effectiveness of the checkpoints in achieving the state's interest. Id.

The focal point of the Court's decision in Sitz, in upholding the constitutionality of the sobriety checkpoint, was the minuscule intrusion in detaining a person in their motor vehicle for less than thirty seconds to ask a few questions, coupled with the important state interest in reducing drunk driving accidents. Despite defendants' assertions, twenty-five

seconds of questioning cannot be compared to the situation currently before me. The involuntary taking of a blood sample from a person's body requires a bodily intrusion through the use of force, punishment, and/or threat of force or punishment. Consistent with Fourth Amendment jurisprudence, a bodily intrusion, with or without the use of force, can only be considered reasonable if probable cause exists to believe the person in question participated in a criminal activity for which a blood sample is relevant evidence. "Because '[t]he integrity of an individual's person is a cherished value in our society,' searches that invade bodily integrity cannot be executed as mere fishing expeditions to acquire useful evidence." Rise, 59 F.3d at 1564 (Nelson, J., dissenting).

Finally, in response to defendants' insistence that individualized suspicion is not required to involuntarily extract a blood sample for the purposes of the DNA data bank, plaintiffs refer the Court to Skinner, Von Raab, and Chandler. This line of cases deals with random drug testing conducted without any form of individualized suspicion and utilize the exact same balancing test set forth in Sitz. According to the Supreme Court, "particularized exceptions to the main rule, [requiring individualized suspicion of wrongdoing], are sometimes warranted based on 'special needs,' *beyond the normal need for law enforcement.*" Chandler, 117 S. Ct. at 1301 (citing Skinner, 489 U.S. at 619) (emphasis added). When a court determines that a special need exists, "[a] concern[] other than crime detection," individualized suspicion is not required and the analyzing court need only weigh "the competing private and public interests advanced by the parties." Chandler, 117 S. Ct. at 1301 (citing Von Raab, 489 U.S. at 665-666) (emphasis added).

Defendants agree with plaintiffs' interpretation of the Skinner line of cases, in that a special needs exception would

have to exist. However, defendants dispute the requirement that the special need advanced by the government must be beyond the normal need for law enforcement. According to defendants, individualized suspicion is not necessary where an important governmental interest exists and the government demonstrates that such interest would be placed in jeopardy by a requirement of particularized suspicion. See Skinner, 489 U.S. at 624. Here, the unquestioned special need is *law enforcement/crime solving.*

This Court finds defendants' interpretation not only too lax, but not consistent with the Supreme Court's holding. The Supreme Court did not intend to permit random suspicionless searches for the sole reason that it would be impractical for the government to require individualized suspicion. "[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." Mincey v. Arizona, 437 U.S. 385, 393 (1978).

In Skinner, 489 U.S. at 634, 619, the Court concluded that the "surpassing safety interests" in preventing accidents warranted the blood testing of employees *involved* in train accidents and the urine and breath testing of persons *violating* safety procedures because safety is a "special need beyond the normal need for law enforcement." Similarly, in Von Raab, 489 U.S. at 664-665, the Court permitted drug testing of U.S. Customs employees required to carry a firearm or directly involved with drug interdiction. Again, the Supreme Court's decision relied on the special circumstances involved and noted society's safety concerns *beyond* mere law enforcement. Most recently, in Chandler, 117 S. Ct. 1295 (1997), the United States Supreme Court analyzed the constitutionality of a state statute permitting random drug testing. This time, the Court held unconstitutional a Georgia statute requiring candidates for state office to pass a drug

test. In so holding, the Court indicated that the statue did not constitute a special need, as the government "offered no reason why ordinary law enforcement methods would not suffice to apprehend such addicted individuals, should they appear in the limelight of a public stage." Id. at 1304. The Court further cautioned that Von Raab is "[h]ardly a decision opening broad vistas for suspicionless searches . . . [and] must be read in its unique context." Id.

Defendants further assert that, even if the special need exception must be a need beyond the normal need for law enforcement, the Act fulfills such a requirement. This Court does not agree. In order to satisfy the special need exception, the government must set forth an important governmental interest beyond the normal need for law enforcement; one that surpasses mere crime detection. See Skinner, 489 U. S. at 619; Chandler, 117 S. Ct. at 1301; and Von Raab, 489 U.S. at 665-666. The Act does not satisfy such requirements, as the purpose for the Act, according to 1997 Mass. Acts c. 106 § 1, is to assist local, state, and federal criminal justice and law enforcement agencies in: (1) deterring and discovering. crimes and recidivistic criminal activity; (2) identifying individuals for, and excluding individuals from criminal investigation or prosecution; and (3) searching for missing persons. The very reasons given by the Act: deterrence, investigation, prosecution, and finding missing persons are all considered normal law enforcement and/or mere crime detection. These objectives do not warrant a special need exception to the Fourth Amendment's requirement of individualized suspicion. "The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the

land." Mapp v. Ohio, 367 U.S. 643, 648 (1961) (citing Weeks v. United States, 232 U.S. 383 (1914)).

B. Article 14 of the Massachusetts Declaration of Rights

Art. 14 of the Massachusetts Declaration of Rights states in pertinent part, "Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions." Plaintiffs argue that the DNA Seizure and Dissemination Act violates the aforementioned portion of art. 14 in that it permits an unreasonable suspicionless search and/or seizure. Defendants maintain that the Act does not violate the Massachusetts Declaration of Rights, as it fits into one of the limited exceptions to art. 14's requirement of probable cause, and thus, does not constitute an unreasonable search and/or seizure.

As a preliminary matter, defendants have correctly asserted that, under ordinary circumstances, actions by administrative agencies, i.e., the promulgation of regulations, and statutes enacted by legislative bodies are presumed to be constitutional. Defendants, however, are incorrect in stating that the analysis usually employed controls the current situation. Massachusetts law has clearly established that "where a fundamental right is at issue, the 'state must show that the statute is necessary to promote a compelling governmental interest." Commonwealth v. Henry's Drywall Co., 366 Mass. 539, 542 (1974) (citing Sherbert v. Verner, 374 U.S. 398, 402409 (1963); Shapiro v. Thompson, 394 U.S. 618, 634 (1969)). Moreover, "in certain circumstances, arguably *involving constitutionally protected liberties,* [the Supreme Judicial Court ("SJC") has] required that the asserted governmental interests be sufficient to outweigh exercise of the individual right." Id. (citing Selectmen of Framingham v.

Civil Serv. Comm'n., 366 Mass. 547 (1974)) (emphasis added).

In the case now before me, it is undisputed that M.G.L. c. 22E §§ 1-1 5, requiring the taking of a DNA sample from persons convicted of one of the enumerated criminal offenses, involves a constitutionally protected liberty interest. Thus, in analyzing the constitutionality of the statute, and the regulations promulgated thereunder, this Court must apply a strict scrutiny analysis. The State shall bear the burden of demonstrating, at least, that the statute is necessary to promote a compelling state interest, and, at most, the existence of a state interest sufficient to outweigh a person's individual right, i.e., a person's right to be let alone. Although defendants declare that the interests asserted by the state, to solve unsolved crimes and to find missing persons, are compelling enough to dispense with the protections of art. 14 and permit random suspicionless DNA testing, this Court does not agree.[5]

The constitutional analysis under art. 14 of the Massachusetts Declaration of Rights is similar to that of the Fourth Amendment to the United States Constitution, albeit more definitive.

Massachusetts case law clearly recognizes that "an order compelling one to give a blood sample is a search and seizure under the Fourth Amendment." Commonwealth v. Trigones, 397 Mass. 633, 640 (1986) (citing Schmerber, 384

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[5] On several occasions, the SJC has recognized the possibility that Massachusetts law affords more substantive protections under art. 14 of the Massachusetts Declaration of Rights than provided for under the Fourth Amendment to the United States Constitution. Commonwealth v. Upton, 394 Mass. 363, 373 (1985); see also Commonwealth v. Sheppard, 387 Mass. 488, 508 n. 22 (1982), rev'd, ___ U.S. ___, 104 S. Ct. 3424 (1984).

U.S. at 767). See also Commonwealth v. Downey, 407 Mass. 472, 476 (1990). Once again, it is not disputed by either party that the involuntary extraction of a person's blood triggers the protections of art. 14 of the Massachusetts Declaration of Rights, as well as the Fourth Amendment to the United States Constitution.

Additionally, it is equally as clear in Massachusetts that in order to compel a person to submit to a blood sample, "there must exist probable cause for believing that the person whose blood the Commonwealth seeks has committed the crime" for which he or she is being investigated. Matter of Lavigne, 418 Mass. 831, 835 (1994). Moreover, "the [suspected] person is entitled to a hearing from which the judge must make findings as to the degree of intrusion and the need for the evidence of the blood sample." Id. (citing Schmerber, 384 U.S. at 771). Consistent with their holding in Lavigne, the SJC has never permitted a bodily intrusion without some form of individualized suspicion.

The SJC first addressed the issue of random suspicionless searches in the context of sobriety checkpoints, the end result being a determination similar to that elucidated by the United States Supreme Court five years later in Sitz. In Commonwealth v. Trumble, 396 Mass. 81, 91 (1985), the SJC upheld the use of roadblocks to deter and detect drunk drivers. In so holding, the SJC relied on the clear demonstration that drunk drivers presented a substantial danger on the highways of Massachusetts, combined with the precise guidelines set forth and the minimal inconvenience to motorists involved. Id. at 96-87.

In Guiney v. Police Commissioner of Boston, 411 Mass. 329 (1991), the SJC again considered the constitutionality of random suspicionless searches, this time in the context of the random urine testing of Boston Police officers. The SJC held

that the random drug testing of police officers violated art. 14 of the Massachusetts Declaration of Rights, as there was no indication of a drug problem in the Boston Police Department; the Commissioner's argument that drug testing would deter drug use by police cadets was merely speculative. Comparing Guiney with the Court's earlier cases involving sobriety checkpoints, the SJC noted that

> "Although the stopping of a motorist's vehicle at a roadblock is a seizure for constitutional purposes, intrusion of a roadblock on a motorist's privacy is fleeting and certainly does not involve the random taking of bodily fluids. This court has *never* approved the nonconsensual [sic] taking of blood or urine of a person in the absence of a demonstrated, particularized basis for doing so."

Id. at 332 (citations omitted) (emphasis added). In rejecting the majority opinion in Von Raab, the SJC further indicated that "[i]f such an intrusive testing process could ever be justified as reasonable [under] art. 14 . . . the government would have to make a strong factual showing that *a substantial public need* exists for the imposition of such a process" and that the government's need "will be *well served* by imposing random urinalysis on unconsenting citizens." Id. at 330, 333 (emphasis added) (citing Von Raab, 489 U.S. at 675 n.3).

Defendants suggest that the current situation illustrates an example of the substantial public need referred to in Guiney and, therefore, justifies the random suspicionless search permitted by the Act. On this point, the defendants are incorrect. It is true that the State has set forth a compelling public in-

terest, to solve and deter criminal activity, however, this interest is not sufficient to outweigh the fundamental right protected by art. 14 of the Massachusetts Declaration of Rights, the right to be let alone. See Olmstead, 277 U.S. 438, 478 (1928)(Brandeis, J., dissenting).

In Guiney, the SJC acknowledged that compelling interests may exist that warrant random suspicionless searches, i.e., sobriety checkpoints, however, the court went out of its way to distinguish such circumstances from those involving bodily intrusions. The more intrusive a procedure, the more protection art. 14 affords. To reiterate, in the court's own words, "this court has *never* approved the nonconsensual [sic] taking of blood or urine of a person in the absence of a demonstrated, particularized basis for doing so." Guiney, 411 Mass. at 332 (citations omitted) (emphasis added). With that said, this Court is unwilling to depart from the SJC's well established constitutional principles and turn art. 14 on its head. Regardless of the State's compelling interest, an unjustified random bodily intrusion without any indication of individualized suspicion is unreasonable and intolerable.

Defendants further point to Skinner, 489 U.S. at 625; Winston, 470 U.S. at 762; and In the Matter of a Grand Jury Investigation, No. 07477, slip op. At 2, 5 (Mass. Apr. 10, 1998), for the proposition that blood tests are considered to be only a minimal bodily intrusion. Defendants reliance on these cases is misplaced. In each of these situations, reference was made to the minimal intrusion involved in extracting a blood sample, in light of the fact that probable cause existed to compel a blood sample to begin with. The reasonableness of the blood testing procedure employed as the result of individualized suspicion has no bearing on the current situation. Where there is no individualized suspicion, the

compelled taking of blood by any means is unreasonable, therefore, unconstitutional.

Similarly, defendants reliance on Hudson v. Palmer, 468 U.S. 517, 530 (1984)(convicted prisoners not protected from routine searches of body cavities and jail cells); Bell v. Wolfish, 441 U.S. 520, 558-560 (1979)(permitting visual body cavity search of inmate for weapons and/or contraband), and Langton v. Commissioner of Corrections, 404 Mass. 165, 167-168 (1989)(strip searches of inmates do not offend Fourth Amendment), is also misplaced. In each of these situations, random suspicionless searches are permitted on the grounds that a special need beyond the need for normal law enforcement exists, i.e., "to ensure the security of the institution and the safety of inmates and all others within its boundaries." Hudson, 468 U.S. at 529. The expansive scope of the Act, compelling blood tests from inmates, probationers, and parolees, is not analogous to a narrow prison setting. Moreover, defendants have not asserted a special governmental need worthy of dispensing with the constitutional rights enjoyed by such a vast group of persons.

Finally, concerning plaintiffs' assertions that the Act is overbroad and will likely be arbitrarily and/or discriminatorily enforced, this Court takes judicial notice of another judicial challenge to the Act currently pending in Middlesex Superior Court. See Miller v. Norton, 353 Mass. 395, 399 (1967)(judge may regard himself as having knowledge of the entries upon the dockets of the court in which he sits). Civil Action No. 97-06600 involves a person ("Murphy") convicted of one of the criminal offenses enumerated in the DNA Seizure and Dissemination Act. According to the pleadings, Murphy was convicted of one of the enumerated offenses in 1985 and is no longer incarcerated, on parole, or on probation for said offense.

Murphy is currently incarcerated for non-violent criminal offenses not included in the Act. Nonetheless, state officials seek to compel Murphy to submit a blood sample for the state DNA database as a result of his prior conviction, even though he was discharged from that sentence in 1993, and from a plain reading of the statute is not subject to its jurisdiction. Although this Court does not determine the outcome of Murphy's situation at this time, it is important to note the expansive interpretation defendants are advocating in order to enforce the Act. In spite of the fact that the Act unmistakably provides that DNA shall be taken only from persons incarcerated, on parole, or on probation for one or more of the enumerated offenses, defendants - as evidenced by the requirements imposed on Murphy - seek to include persons that clearly do not fall within the aforementioned categories, thus, exhibiting their disregard for their own regulations. See 1997 Mass. Acts c. 106 § 8. By their own actions, and their arguments in Murphy, the Commonwealth seeks an expansive view of the statute and its execution. This approach only serves to aggravate the dangers built into this statute.

As stated previously, in order for a statute concerning fundamental fights to withstand a constitutional challenge, the statute must survive a strict scrutiny test in which the State must demonstrate that the statute or regulations are narrowly tailored to achieve the compelling state interest. This Court is not convinced that the State has met this burden. See Henry's Drywall Co., 366 Mass. at 541. The statute in question incorporates non-violent crimes for which DNA evidence is generally not helpful and for which the recidivism rates are not significant. The regulations permit coercion, use of force, as well as monetary and prison punishments for the failure to consent to the taking of a blood sample. Furthermore, the record demonstrates that enforce-

ment of the Act has been quite arbitrary, as defendants' own regulations have been disregarded on a number of occasions and persons not subject to the Act have received notice of their requirement to submit a blood sample.

Although defendants have asserted a compelling state interest, under no interpretation ran this statute or the regulations thereunder be considered narrowly tailored and warrant such an infringement of the fundamental fights protected by art. 14 of the Massachusetts Declaration of Rights and the Fourth Amendment to the United States Constitution. There is no precedent for defendants' requested departure from settled constitutional jurisprudence, therefore, the government is asking this Court to take a position it simply cannot, and will not, take.

V. CONCLUSION

After extensive review of Fourth and Fourteenth Amendment jurisprudence and art. 14 of the Massachusetts Declaration of Rights, I find that the Act and its regulations do not withstand constitutional muster. Compelling persons to submit to invasive searches without particularized suspicion violates both the state and federal constitutions. I find and declare that the involuntary extraction of blood from the plaintiffs, pursuant to §§ 1-15 of the Act is unconstitutional under the Fourth Amendment to the United States Constitution, independent and apart from the Fourth Amendment, these provisions also violate art. 14 of the Declaration of Rights. Accordingly, defendants are enjoined from invoking the provisions of M.G.L. c. 22E §§ 1-15 to obtain DNA samples.

ORDER

For the reasons set forth above, it is hereby ordered that plaintiffs', second motion for preliminary injunction, be **ALLOWED**. Pending further Court order, the defendants are hereby enjoined from enforcing the DNA Seizure and Dissemination Act. The defendants will not participate in the collection, analysis, and/or dissemination of DNA of the plaintiffs or of anyone subject to the provisions of the Act. DNA samples already in the possession of the Director of the State Crime Laboratory shall remain sealed, impounded, segregated, and separately stored pending further notice by the Court.

/s/
Isaac Borenstein
Justice of the Superior Court

Dated: August 12, 1998

APPENDIX C.

CRIMES—FORENSIC TECHNOLOGY—DNA SAMPLES

CHAPTER 106

H.B. No. 4646

AN ACT relative to the enhancement of forensic technology.

Be it enacted by the Senate and *House of Representatives in General Court assembled, and by the authority of the same, as follows:*

SECTION 1. It shall be the policy of the commonwealth to assist local state and federal criminal justice and law enforcement agencies in: (1) deterring and discovering crimes and recidivistic activity; (2) identifying individuals for, and excluding individuals from, investigation or prosecution; and (3) searching for missing persons. Said policy shall be served by establishing facilities for comparing biological evidence recovered during criminal investigations with biological material obtained from offenders convicted of crimes in the commonwealth.

SECTION 2. Deoxyribonucleic acid, hereinafter referred to as DNA, is located in the nuclei of human cells and encodes genetic information that is the basis of human heredity and forensic identification. DNA is recovered frequently from the scenes of violent crimes against the person including sexual offenses. The legislature finds that the collection and basis of DNA samples is an integral part of the investi-

gation and prosecution of criminal offenses and that such technology is an important tool in the defense of individuals charged with criminal offenses in the commonwealth.

SECTION 3. Chapter 6 of the General Laws is hereby amended by inserting after section 178 O, as appearing in the 1996 Official Edition, the following section:—

Section 178P. Whenever a police officer has probable cause to believe that a sex offender has failed to comply with the registration requirements of sections 178C to 178 O, inclusive, such officer shall have the right to arrest such sex offender.

SECTION 4. Section 1 of chapter 22A of the General Laws, as so appearing, is hereby amended by inserting after the definition of "Missing child or children" the following definition:- "Person", any individual, whether an adult or a child.

SECTION 5. Section 6 of said chapter 22A, as so appearing, is hereby amended by striking out, in lines 1, 3 and 11, the word "child", each time it appears, and inserting in place thereof, in each instance, the following word:— person.

SECTION 6. Said section 6 of said chapter 22A, as so appearing, is hereby further amended by striking out, in line 7, the word "children" and inserting in place thereof the following word:— persons.

SECTION 7. The General Laws are hereby amended by inserting after chapter 22D, as so appearing, the following chapter:—

CHAPTER 22E.

STATE DNA DATABASE.

Section 1. As used in the following words have the following meanings, unless the context clearly requires otherwise:—

"CODIS" or "combined DNA index system", the Federal Bureau of Investigation's national DNA identification index system which facilitates the storage and exchange of DNA records submitted by state and local justice and law enforcement agencies.

"Colonel", the colonel of state police.

"DNA", deoxyribonucleic acid.

"DNA analysis", DNA typing tests that generate numerical identification information and are obtained from a DNA sample.

"DNA record", DNA information that is derived from a DNA sample and DNA analysis and is stored in the state DNA database or in CODIS, including all records pertaining to DNA analysis.

"DNA sample", biological evidence of any nature that is utilized to conduct DNA analysis.

"Department", the department of state police.

"Director", the director of the crime laboratory within the department of state police.

"FBI", the Federal Bureau of Investigation within the United States department of justice.

"State DNA database", the DNA identification records system maintained and administered by the director.

Section 2. There is hereby established within the department of state police a state DNA database under the direction of the director. The director shall be a person knowledgeable

in the field of forensic sciences and shall be paid an annual salary which shall be set by the colonel in consultation with the secretary of public safety and the secretary for administration and finance. Such salary shall be competitive with comparable or similar positions in other jurisdictions. The director shall have responsibility for DNA analysis and the management and administration of the state DNA database.

Section 3. Any person who is convicted of an offense under the provisions of section 1, 13, 13B, 13F, 13H, 14, 15, 16, 17, 18, 18A, 18B, 18C, 22, 22A, 23, 24, 24B or 26 of chapter 265, section 14 or 15 of chapter 266 or section 2, 3, 4A, 4B, 16, 17, 29, 29A, 29B, 35, 35A or 53A of chapter 272 of the aforementioned offense shall submit a DNA sample which shall be collected by a person authorized pursuant to section 4, to the department with 90 days of such conviction, in accordance with regulations or procedures established by the director. The results of such sample shall become part of the state DNA database. The submission of such DNA sample shall not be stayed pending a sentence appeal, motion for new trial, appeal to an appellate court or other post conviction motion or petition.

Section 4. (a) The director may establish regulations or procedures for the collection of DNA samples, including standards for training and licensing personnel who may collect such samples. Only a physician, registered professional nurse, licensed practical nurse, phlebotomist, health care worker with phlebotomist training or a person licensed and trained by the director shall collect DNA samples pursuant to section 3. No person authorized under this section to collect DNA samples, including blood samples, shall be subject to civil liability for the act of withdrawing blood, or any other act directly related to the taking of a DNA sample; provided, however, that they shall employ recognized medical proce-

dures and comply with all regulations or procedures promulgated by the director for the collection of DNA samples. Duly authorized law enforcement and correction personnel may employ reasonable force to assist in collecting DNA samples in cases where an individual refuses to submit to such collection as required under this chapter; provided, further, that such law enforcement and correction personnel shall not be subject to criminal prosecution or civil liability for the use of such reasonable force.

(b) The cost of preparing, collecting and processing a DNA sample shall be against the person required to submit a DNA sample, unless such person is indigent as defined in section 27A of chapter 261. The cost of preparing, collecting and processing a DNA sample shall be determined by the secretary for administration and finance in consultation with the director and shall be paid to the department and retained by it to offset costs associated with creating, maintaining and administering the state DNA database.

Section 5. The department shall provide all blood sample vials, collection tubes, mailing tubes, other DNA sample collection materials, labels and instructions for the collection of DNA samples pursuant to this chapter.

Section 6. All DNA samples collected pursuant to sections 3 and 4 shall be forwarded to the director for the purpose of DNA analysis. The director shall provide for the receipt and analysis of DNA samples and for the filing and storage of DNA records derived from such DNA analysis in the state DNA database. The director shall promulgate regulations governing the collection, submission, receipt, identification, storage and disposal of DNA samples.

Section 7. The department is hereby authorized to establish such laboratories and facilities within the commonwealth as may be necessary to conduct forensic and DNA analysis.

Notwithstanding the provisions of any general or special law to the contrary, the department is hereby authorized to enter into such contracts, agreements or partnerships with governmental or nongovernmental entities, including educational, scientific, medical or not for profit entities, as the director may deem necessary to meet the purposes of this chapter.

Section 8. The director shall establish procedural rules governing the testing and analysis of DNA samples and a quality assurance program, which shall include proficiency standards for laboratories and analysts responsible for performing DNA testing and analysis. Such procedural rules and quality assurance program shall be compatible with the procedural rules and quality assurance program utilizied by the FBI and shall establish compatible laboratory techniques, laboratory equipment, supplies, computer software and acceptance criteria for DNA records in CODIS. The director may employ independent forensic laboratories to perform the DNA analysis required under section 3; provided, however, that such laboratories shall comply with the regulations established pursuant to this section and the procedural rules and quality assurance program established pursuant to this section and the procedural rules and quality assurance program established pursuant to this section. With respect to any independent forensic laboratory that performs or seeks to perform the DNA analysis required under section 3, the director may audit such laboratory for compliance with such regulations or procedures as may be adopted under this chapter and may revoke such laboratory's right to create and exchange DNA records on the ground that such laboratory has failed to comply with any regulations, procedures, rules or quality assurance programs established pursuant to this section.

Section 9. All DNA records collected pursuant to this chapter shall be confidential and shall not be disclosed to any person or agency unless such disclosure shall be authorized by this chapter. DNA records shall not be stored in a criminal offender record information system operated by the criminal history systems board pursuant to sections 167 to 178, inclusive, of chapter 6.

Section 10. (a) The director shall furnish records and analysis, to police departments in cities and towns, to the department, to the department of correction, to a sheriff's department, to the parole board or to prosecuting officers within the commonwealth upon request in writing or electronically.

(b) The director shall make DNA records available upon written or electronic request to:

(1) local state and federal criminal justice and law enforcement and prosecuting agencies, including forensic laboratories serving such agencies, for identification purposes in order to further official criminal investigations or prosecutions; provided, however, that any DNA sample obtained directly from a person not otherwise required to provide a DNA sample under this chapter and delivered to the director for comparison with DNA records in the state DNA database shall have been obtained pursuant to a warrant; (2) the FBI for storage and maintenance in CODIS; and (3) any person who has been identified and charged with a criminal offense as a result of a search of DNA records stored in the state DNA database; provided, however, that such access shall be limited to DNA information pertaining to such individual.

(c) The director shall make DNA records available upon written or electronic request to meet such purposes or comply with such statutory obligations as may be required under

federal law as a condition to obtaining federal grants or funding.

(d) The director may, in his discretion, make DNA records available to authorized persons or organizations, upon written or electronic request, for the limited purpose of (1) advancing DNA analysis methods and supporting statistical interpretation of DNA analysis, including development of population databases; provided, however, that personal identifying information shall be removed from DNA records disclosed for such purposes; (2) assisting in the identification of human remains from mass disasters; (3) assisting the identification and recovery of missing persons; and (4) advancing other humanitarian purposes.

Section 11. Any person required to provided a DNA sample pursuant to this chapter and who refuses to provide such DNA sample shall be subject to punishment by a fine of not more than $1,000 or imprisonment in a jail or house of correction for not more than six months or both.

Section 12. Any person who, by virtue of employment or official position, has possession of, or access to, a DNA sample or record or portion thereof contained in the state DNA database and who purposely discloses such record or portion thereof in any manner to any person or agency not authorized to receive such record or portion thereof shall be subject to punishment by a fine of not more than $1,000 or imprisonment in a jail or house of correction for not more than six months or both.

Section 13. Any person who, without proper authorization, willfully obtains a DNA record or a portion thereof contained in the state DNA database shall be subject to punishment by a fine of not more than $1,000 or imprisonment in a jail or house of correction for not more than six months or both.

Section 14. Any person who tampers with or attempts to tamper with a DNA sample or DNA record with the intent to interfere with DNA analysis shall be subject to punishment by a fine of not more than $5,000 or imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two and a half years or both such fine and imprisonment.

Section 15. Any person whose DNA record has been included in the state DNA database may apply to the superior court to have such record expunged on the grounds that the conviction or judicial determination that resulted in the inclusion of the person's DNA record in the state DNA database has been reversed and the case dismissed; provided, however, that one year shall have elapsed from the date the judgment reversing or dismissing the conviction became final or such person shall have obtained, in writing, authorization from the district attorney that no further prosecution is contemplated under the original offense for which such person was convicted or for which original judicial determination was entered.

SECTION 8. Any person convicted of any offense listed in section 3 of chapter 22E of the General Laws, who is incarcerated in any prison or house of correction on the effective date of this act, notwithstanding the date of such conviction, shall submit a DNA sample to the department within 90 days of the effective date of this act or prior to release from custody, whichever first occurs. Any person currently on probation or parole as the result of a conviction or judicial determination resulting from a charge of any of the above listed offenses, notwithstanding of the date of such conviction or judicial determination, shall submit a DNA sample to the department within 90 days of the effective date of this act.

APPENDIX D.

TITLE 515: DEPARTMENT OF STATE POLICE

CHAPTER 1.00: COLLECTION, SUBMISSION, RECEIPT, IDENTIFICATION, STORAGE, AND DISPOSAL OF DNA SAMPLES

Current with amendments received through Register Number 860

REGULATORY AUTHORITY

515 CMR 1. 00: M.G.L. c. 22E, §§ 4 and 6.

1.01: Purpose

Current with amendments received through Register Number 860

The purpose of 515 CMR 1.00 et seq. is to provide rules and regulations governing the collection, submission, receipt, identification, storage and/or disposal of DNA samples for a state DNA database/CODIS pursuant to the terms and provisions of M.G.L. c. 22E.

1.02: Scope and Applicability

Current with amendments received through Register Number 860

515 CMR 1.00 et seq. is adopted by the Director of the Massachusetts State Police Crime Laboratory under the authority of M.G.L. c. 22E. §§ 4 and 6 to establish rules and regulations as described in those sections.

1.03: Definitions

Current with amendments received through Register Number 860

CODIS or Combined DNA Index System. The Federal Bureau of Investigation's national DNA identification index system which facilitates the storage and exchange of DNA records submitted by state and local criminal justice and law enforcement agencies.

Crime Laboratory. Massachusetts State Police Crime Laboratory of the Department of State Police.

Department. The Department of State Police.

Director. The Director of the Massachusetts State Police Crime Laboratory. DNA. Deoxyribonucleic acid.

DNA Analysis. DNA typing tests that generate numerical identification information and are obtained from a DNA sample.

DNA Database. The DNA identification records system maintained and administered by the Director.

DNA Database Blood Collection Kit or Kit. The kit provided by the Department for the collection of DNA samples. This kit is contained in a separate envelope from the outer manila mailing envelope and is labeled as the "DNA Database Blood Collection Kit."

DNA Record. DNA information that is derived from a DNA sample and DNA analysis and is stored in the state DNA database or in CODIS, including all records pertaining to DNA analysis.

DNA Sample. Biological evidence of any nature that is utilized to conduct DNA analysis.

DOC. Department of Corrections.

Evidence Technician. Individual authorized by the Director to perform the duties set forth in 515 CMR 1.00.

FBI. The Federal Bureau of Investigation vathin the United States Department of Justice.

FTA. Specialized paper that binds DNA.

HOC. House of Corrections.

1.04: Collection, Submission, Identification and Transfer of DNA Samples

Current with amendments received through Register Number 860

(1) Applicability. Blood samples for DNA typing shall be collected from DOC, Sheriffs, Parole and Probation Departments "in custody" or "probation/parole" offenders as specified in M.G.L. C. 22E.

(2) Unique Identifier. Each offender's DNA sample shall be logged with a unique identifier number.

(3) Collection, Submission, Identification and Transfer of DNA Samples.

(a) All DNA samples obtained for DNA analysis shall be collected using an approved, Massachusetts State Police

Crime Laboratory DNA Database Blood Collection Kit as supplied by the Department.

(b) Each DNA Database Blood Collection Kit shall contain all necessary materials for blood collection via finger stick and for proper identification of the offender. The kit shall contain the following items: kit instruction sheet, sterile lancet, plastic specimen bag with moisture absorbing packet, sterile gauze pad, one pair barrier gloves, absorbent alcohol pad, adhesive bandage, pre-numbered DNA Database Information Card, pre-numbered DNA Database Collection Card, security seal, kit shipping seal, and pre-numbered collection kit envelope. The numbers that are pre-printed onto the manila mailing envelope, collection kit envelope, DNA Database Information Card and the DNA Database Collection Card shall be the same number, and shall be numbered sequentially from one kit to the next so that each kit number shall serve as a unique identifier.

(c) For blood collection, all DNA samples shall be collected by approved individuals as specified in M.G.L. c. 22E, § 4(a). Prior to blood collection the kit shall be removed from the manila mailing envelope. The kit shall be used only if the kit envelope seal is intact. The number on the front of the kit envelope shall be checked to ascertain that it corresponds with the number on the front of the manila mailing envelope. The kit may then be unsealed. All components of the kit shall be removed and checked against the inventory list on the instruction sheet to verify that all kit components are present and that the pre-printed numbers on the DNA Database Information Card and the DNA Database Collection Card correspond to the number on the manila mailing envelope and kit envelope.

(d) All information requested on the DNA Database Information Card shall be filled out as completely as possible. This information shall include: the offender's name in full, current address, social security number, date of birth, sex, race, submitting agency, name and signature and agency of person obtaining the blood sample, date, form of positive identification shown by the offender, appropriate space for a rolled right thumb inked fingerprint and the signature of the person taking the fingerprint.

(e) The DNA Blood Collection Card shall be filled out as completely as possible and shall include the following information: race, sex, name of blood collector, signature of blood collector, date and time of sample collection, signature of person taking offender's fingerprint, date and time of fingerprint application, and an appropriate space for a rolled right thumb inked fingerprint.

(f) After the above data are entered on the DNA Database Information Card and the DNA Database Collection Card, standard fingerprint procedures shall be used to roll the offender's inked right thumb onto the cards within the appropriate spaces. The fingerprint will be applied by law enforcement personnel, corrections officers or health care personnel trained by the director or his/her designee for that purpose.

(g) Finger stick blood samples shall be obtained using recognized medical procedures.

(h) Prior to each individual blood collection procedure, personnel performing the collection shall put on barrier gloves.

The FTA Blood Collection Paper contained within the DNA Database Collection Card shall not be touched unless the individual collecting the offender's blood is wearing barrier gloves.

(i) The tip of the offender's finger shall be wiped with an absorbent alcohol pad.

(j) The offender's finger shall be pricked using a sterile, fixed depth lancet.

(k) The offender's finger shall be positioned over one of the four circles printed on the FTA Blood Collection Paper, and the finger shall be milked, allowing two drops of blood to fall onto the FTA paper, within the circle. This procedure will be repeated for the remaining three circles if possible.

(l) A sterile gauze pad shall be used to wipe off any remaining blood from the offender's finger, and an adhesive bandage shall be affixed to the offender's finger.

(m) All used medical supplies (lancet, absorbent alcohol pad, gauze pad, barrier gloves) shall be discarded in compliance with standard medical procedures.

(n) The blood on the FTA Blood Collection Paper shall be allowed to air dry for approximately 30 minutes. The FTA Blood Collection Paper shall not be touched, nor shall it be allowed to come in contact with any other FTA Blood Collection Paper during the drying and packaging stages.

(o) The DNA Database Collection Card containing the FTA Blood Collection Paper shall be placed into the self-sealing

plastic specimen bag provided in the kit, and the bag shall be sealed. The moisture absorbing packet shall not be removed from the plastic specimen bag.

(p) The sealed plastic specimen bag containing the DNA Database Collection Card and the FTA Blood Collection Paper shall then be placed into the kit envelope. The kit envelope flap will be moistened and the envelope sealed. The security seal provided in the kit shall then be affixed where indicated on the kit envelope. The security seal shall be dated and initialed.

(q) The sealed kit envelope and the DNA Database Information Card shall be placed in the pre-addressed manila mailing envelope. The manila mailing envelope flap shall be moistened and sealed and the shipping seal included in the kit shall be affixed where indicated.

(r) The manila mailing envelope shall be pre-printed with the mailing address of the Crime Laboratory, Business Reply Mail, postage paid by the Department. The manila mailing envelope shall be conspicuously marked as containing dried blood specimens with a biohazard label.

(4) Submission of DNA Samples. DNA samples, collected in accordance with 515 CMR 1.04(3). shall be submitted to the Crime Laboratory by one of two methods: either in person by approved personnel or via delivery service such as U.S. mail. The manila mailing envelope shall be mailed or delivered to the Crime Laboratory after collection. If the manila mailing envelopes are hand delivered they should be delivered directly to:

Massachusetts State Police Crime Laboratory

59 Horse Pond Road

Sudbury, Massachusetts 01776-9923

(5) Record Keeping. The individual who collects each DNA sample shall provide an accurate, up-to-date list of every DNA sample collected each day of collection. Any failed attempts to collect blood from an offender and the reason for the failure (e.g. refusal of offender to submit, failure to keep scheduled appointment) shall also be indicated. The list will include the following information: the kit number, the offender's name, the name of the person collecting the sample and the submitting agency together with any additional data which the Director deems necessary. This information shall be forwarded in the form of an audit sheet to the Director on a daily basis, via both FAX and US mail. If the manila mailing envelopes are hand delivered to the Crime Laboratory the audit sheet shall accompany the manila mailing envelopes being delivered.

(6) Inquiries. Any information pertaining to the use of this kit, supplies, collection, packaging, transporting, and/or shipping of these samples shall be directed to the Crime Laboratory Director.

1.05: Tracking, Receipt, Storage and Disposal of DNA Samples

Current with amendments received through Register Number 860

(1) Procedure for the Evidence Technician.

(a) Upon receipt of a DNA Sample at the Crime Laboratory, the evidence technician will, prior to opening the manila mailing envelope, reference the audit sheet which has been obtained from the collection sites to confirm receipt of the reported collections.

(b) The evidence technician shall open the manila mailing envelope and remove the DNA Database Information Card and the sealed DNA Database Blood Collection Kit envelope. The evidence technician shall open the kit envelope but shall not open the sealed specimen bag. The evidence technician shall discern the DNA Database Collection Card number by viewing through the clear plastic of the sealed specimen bag to ensure that such identifying number is the same number as that on the kit envelope, the DNA Database Information Card, and the manila mailing envelope.

(c) All DNA Database Collection Cards must be received in a sealed specimen bag. If received in an unsealed condition, this shall be noted in an Incident Log, and a repeat sample shall be obtained.

(d) The Director will be notified of any discrepancies with respect to the agreement of kit numbers, verification of fingerprints, or for any other reason that a sample appears unacceptable. Any irregularity or discrepancy shall be noted in an Incident Log and the Director shall be notified. The Director shall take appropriate action in accordance with standard operating procedures.

(e) The evidence technician shall use the information provided in the DNA Database Information Card to record the following information: the date the specimen is collected and

the date received, the kit number, and the submitting agency (DOC, HOC, Probation, or Parole)and the last name, first name, and middle initial, date of birth and social security number of the offender.

(2) Handling and Storage of Sealed Specimen Bags.

(a) The sealed specimen bags containing the DNA Database Collection Cards shall be stored in a dedicated storage area within the Crime Laboratory. Access to the sealed bags and to the storage area shall be limited to authorized personnel.

(b) Any access to or removal/return of the sealed specimen bags shall be documented using standard chain of custody procedures.

(c) Only authorized personnel shall open a sealed specimen bag and shall initial and date the broken seal and shall reseal the specimen bag in accordance with standard forensic operating procedures.

(3) Handling and Storage of Data Information Cards.

(a) The DNA Database Information Cards shall be stored in a secured designated area and access to these cards shall be limited to authorized personnel.

(b) The DNA Database Information Cards may be examined for quality control purposes (including evaluation of fingerprint quality).

(c) The DNA Database Information Cards may be examined by a qualified fingerprint examiner to verify the identity of the offender.

(4) Disposal of DNA Samples. DNA samples on FTA Blood Collection Paper, DNA Database Collection Cards and DNA Database Identification Cards shall be stored indefinitely in a secure storage area unless otherwise required, as specified in M.G.L. c. 22E, § 15.

1.06: Severability

Current with amendments received through Register Number 860

If any article, section, subsection, sentence, clause or phrase of 515 CMR 1.00 et seq. is for any reason determined to be unconstitutional, contrary to statute, in excess of authority, or otherwise inoperative, such determination shall not affect the validity of any other article, section, subsection, sentence, clause or phrase of 515 CMR 1.00 et seq.

Supreme Court, U.S.
FILED
1999
OFFICE OF THE CLERK

No. 99-359

IN THE
Supreme Court of the United States
OCTOBER TERM, 1999

DONALD LANDRY, et al., *Petitioners,*

v.

THOMAS F. REILLY, et al., *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

RESPONDENTS' BRIEF IN OPPOSITION

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Issue Presented

Should this Court grant certiorari to review an interlocutory decision of the Massachusetts Supreme Judicial Court vacating a preliminary injunction against enforcement of a narrowly-drafted DNA database statute, where there is no conflict among the federal circuit courts of appeal or the state appellate courts as to the reasonableness under the Fourth Amendment of obtaining DNA samples from a defined group of convicted persons for identification purposes, and where the underlying state civil action has gone to final judgment and the time for appeal has expired?

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No. 99-359

IN THE
Supreme Court of the United States
OCTOBER TERM, 1999

DONALD LANDRY, et al., ***Petitioners,***

v.

THOMAS F. REILLY, et al., ***Respondents.***

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Thomas F. Reilly, the Attorney General for the Commonwealth of Massachusetts; Carl M. Selavka, Director of the Massachusetts State Crime Laboratory; Reed Hillman, Superintendent of the Massachusetts Department of State Police; Sheila Hubbard, Chair of the Massachusetts Parole Board; Michael Maloney, Commissioner of the Massachusetts Department of Correction; and John O'Brien, Massachusetts Commissioner of Probation, respectfully request that this Court deny the petition for writ of certiorari.

Opinion Below

In *Landry v. Attorney General*, 429 Mass. 336, 709 N.E.2d 1085 (1999), the Massachusetts Supreme Judicial Court vacated the entry of a preliminary injunction against enforcement

of the Massachusetts DNA[1] database statute, holding that the statute's provision for obtaining DNA samples from certain convicted persons was reasonable under the Fourth Amendment and Article 14 of the Massachusetts Declaration of Rights. The Court remanded the case to the Superior Court for further proceedings. On remand, the Superior Court dismissed the case, and petitioners took no appeal.[2]

Statement of the Case

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION

Petitioners seek a writ of certiorari to the Massachusetts Supreme Judicial Court to review that Court's decision vacating a preliminary injunction against enforcement of the Massachusetts DNA database statute, 1997 Mass. Acts ch. 106, codified in part at Mass. Gen. Laws ch. 22E, §§ 1-15 (1997), on the ground that the statute's provisions regarding collection of DNA samples from certain persons convicted of crimes are reasonable under the Fourth Amendment. Because the issue raised by the preliminary injunction has been mooted by the entry of final judgment, and because the Supreme Judicial Court's decision is consistent with the decisions of this Court and of every other appellate court that has addressed the issue, the petition should be denied.

The petitioners filed their complaint in the Middlesex County Superior Court on February 2, 1998. In the complaint, as amended on February 17, 1998, petitioners sought a declaration that the Massachusetts DNA Database statute, 1997 Mass. Acts

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[1]Deoxyribonucleic acid.

[2] Both the Supreme Judicial Court's opinion and the Superior Court's order entering the preliminary injunction have been reproduced in the petitioners' Appendix. References to the petitioners' Appendix will be abbreviated (Pet. App. at), and references to the respondents' Appendix, *post*, will be abbreviated (Resp. App. at).

ch. 106, codified in part at Mass. Gen. Laws ch. 22E, §§ 1-15 (1997) ("the Act") (reproduced in Pet. App. at 52a-60a), which requires persons convicted of designated criminal offenses to submit DNA samples to the State Police, violated, *inter alia*, the Fourth Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Double Jeopardy Clause of the Fifth Amendment, and the Ex Post Facto Clause of the United States Constitution, as well as cognate state provisions, including Article 14 of the Massachusetts Declaration of Rights. Petitioners also sought preliminary and permanent injunctive relief from enforcement of the Act.

On February 9, 1998, the Superior Court entered its first order preliminarily enjoining enforcement of the Act on the ground that regulations governing the collection, analysis, and dissemination of DNA samples were required. Even after such regulations were promulgated on an emergency basis,[3] the Superior Court declined to vacate the preliminary injunction. On April 7, 1998, while an appeal from that order was pending, the petitioners moved again for a preliminary injunction on the constitutional grounds raised in the amended complaint. Additional regulations governing the analysis and dissemination of DNA samples were promulgated on July 29, 1998.[4]

On August 14, 1998, the Superior Court entered its second order preliminarily enjoining enforcement of the Act, relying on the Fourth Amendment and the corresponding state constitutional provision, Article 14 of the Massachusetts Declaration of Rights. The respondents took an interlocutory appeal to the Massachusetts Appeals Court under Mass. Gen. Laws ch. 231, § 118, and the Massachusetts Supreme Judicial Court ordered the case transferred to that Court on November 17, 1998.

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[3]*See* 515 C.M.R. §§ 1.00-1.06, reproduced in Pet. App. at 61a-71a.

[4]*See* 515 C.M.R. §§ 2.00-2.16, reproduced, *post*, in Resp. App. at 8a-25a.

On April 13, 1999, the Supreme Judicial Court issued its decision vacating the preliminary injunction on the grounds that the Act's provisions for obtaining DNA samples from persons convicted of designated offenses were reasonable, both under the Fourth Amendment and under Article 14 of the Massachusetts Declaration of Rights, and holding that additional regulations regarding "reasonable force" were not required. *Landry v. Attorney General*, 429 Mass. 336, 338, 347-352, 709 N.E.2d 1085, 1087,1092-1095 (1999). The Court remanded the case to the Superior Court for further proceedings.

The Superior Court entered a judgment of dismissal on May 26, 1999, and denied a motion to reconsider on July 9, 1999. Petitioners claimed no appeal, and the time for appeal has expired.

II. FACTS

A. *The Massachusetts DNA Database Statute*

The Massachusetts Legislature enacted the DNA database statute on September 30, 1997. 1997 Mass. Acts ch. 106, codified in part at Mass. Gen. Laws ch. 22E, §§ 1-15 (1997) (Pet. App. at 52a-60a). Its stated purposes are to assist law enforcement agencies in:

> (1) deterring and discovering crimes and recidivistic criminal activity; (2) identifying individuals for, and excluding individuals from, criminal investigation or prosecution; and (3) searching for missing persons.

Id. § 1.

Effective December 29, 1997, the Act requires persons who are convicted of any of thirty-three designated crimes to submit DNA samples within ninety days of conviction. Mass. Gen. Laws ch. 22E, § 3. There is no exception for pending appeals or postconviction motions, *id.*, but if a conviction is reversed and the charges dismissed, relevant DNA records may be expunged by court order. *Id.* § 15.

The Act further requires that persons who had previously been convicted of any offense specified in § 3 and who were incarcerated on the effective date must provide a DNA sample "within 90 days of the effective date of this act or prior to release from custody, whichever first occurs." 1997 Mass. Acts ch. 106, § 8.[5] The same ninety-day deadline applies to persons on probation or parole "as a result of a conviction or judicial determination resulting from a charge of any of the [designated offenses]." *Id.* The failure to furnish a required sample is punishable by a fine of up to $1,000 or up to six months imprisonment. *Id.* § 11.

Pursuant to the Act and regulations, Mass. Gen. Laws ch. 22E, § 4(a) and 515 C.M.R. § 1.04 (1998), medical or licensed personnel collect DNA samples by pricking the offender's finger with a sterile lancet.

The Act limits access to and use of the information obtained from DNA samples. Mass. Gen. Laws ch. 22E, §§ 6-10. All DNA samples are to be forwarded to the crime laboratory director "for the purpose of DNA analysis," *id.* § 6. That analysis is defined as the generation of "numerical identification information," *id.* § 1. As the regulations make clear, this information may be derived only from STR[6] testing, 515 C.M.R. § 2.04(1) (Resp. App. at 13a). STR loci are "particularly appropriate for forensic use" because they do not reveal general genetic information. National Research Council, The Evaluation of Forensic DNA Evidence 117 (1996). Moreover, DNA records are confidential and may be disclosed only as authorized by the Act. *Id.* § 9. The Supreme Judicial Court has construed the provisions of the Act regarding dissemination to law enforcement

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[5]This provision was upheld in *Murphy v. Department of Correction*, 429 Mass. 736, 744, 711 N.E.2d 149, 156 (1999).

[6]Short tandem repeat.

agencies to be limited to identification information only. *Landry*, 429 Mass. at 353 n.18, 709 N.E.2d at 1096 n.18.[7]

The Act imposes strict penalties for violations of its provisions. Any person who has information from the DNA database "by virtue of employment or official position," and "purposely discloses" it to any unauthorized person or agency is subject to a fine or imprisonment. Mass. Gen. Laws ch. 22E, § 12. Unlawful possession of DNA information is a criminal offense, as is tampering, or attempting to tamper, with DNA information. *Id.* §§ 13-14.[8]

B. *Implementation of the Statute*

Petitioners Gallello, Hallett, and Pironti were incarcerated for offenses designated in Mass. Gen. Laws ch. 22E, § 3, as of December 29, 1997. On January 24, 1998, the respondents, through trained medical personnel, collected DNA samples from them. Petitioners Landry, Cartagena, Troisi, and Pistorino were either on parole or probation with respect to designated offenses as of December 29, 1997. The respondents notified each of them of their obligation to provide a DNA sample and instructed them to call a toll-free number to schedule an appointment to provide a DNA sample. The record is silent as to whether any of the latter four has provided a DNA sample.

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[7] The petitioners exclude from their Appendix all the regulations relating to limitations on DNA analysis and dissemination found in 515 C.M.R. §§ 2.00-2.16 (reproduced in Resp. App., *post*, at 8a-25a). Petitioners' claims that "multiple genetic tests . . . can be conducted into the foreseeable future" (Petition at 4) and that DNA analysis "may disclose a person's entire genetic makeup" (Petition at 25) are contradicted by the limitation to STR testing for identification information only, and by the Act's restrictions on use and dissemination of the identification information.

[8] Disclosure to an unauthorized person is subject to a fine of up to $1,000 or imprisonment for not more than six months, as is unauthorized use of DNA information, while tampering is punishable by a fine of up to $5,000, imprisonment for up to five years, or both. Mass. Gen. Laws ch. 22E, §§ 12-14.

Contrary to the suggestions in the petition (Petition at 19), multiple sites and times were made available for sample collection, and persons calling the toll-free number were "given the opportunity to select the site and date most convenient for them and to reschedule their appointments if necessary" (Affidavit of David I. Ranieri, Resp. App. at 4a). Moreover, while reasonable force is authorized by the Act, Mass. Gen. Laws ch. 22E, § 4(a), the record contains nothing to support petitioners' suggestions that force was actually used to extract samples from petitioners (Petition at 6). To the contrary, petitioners Gallello, Hallett, and Pironti allege in the amended complaint that they submitted, albeit involuntarily, to the finger-prick extraction.[9]

Approximately 1,250 DNA samples were collected prior to the issuance of the first preliminary injunction on February 9, 1998. When the first injunction went into effect in February, 1998, the crime laboratory director was forced to cancel over 1,000 appointments that probationers and parolees had made to provide DNA samples. During the month of February 1998, while the injunction remained in effect, about 200 inmates, probationers, and parolees required to submit DNA samples were released from the custody and supervision of the Commonwealth without having submitted samples.

Collection of samples has resumed since vacation of the preliminary injunction and dismissal of the case in May 1999.

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[9]Similarly, there is nothing in the record indicating that samples were taken from persons not covered by the Act (see Petition at 6). The lower court judge may have been referring to the application of the Act to incarcerated persons with prior records for designated offenses, a category that the Supreme Judicial Court has since held to be plainly within the Act. *Murphy v. Department of Correction*, 429 Mass. at 744, 711 N.E.2d at 156.

Reasons for Denying the Writ

Petitioners are seeking review on certiorari of an interlocutory decision of the Massachusetts Supreme Judicial Court, vacating a preliminary injunction against enforcement of the Massachusetts DNA database statute. Not only is the appeal moot, as final judgment has entered, but the Supreme Judicial Court's decision is fully consistent with the decisions of this Court and of every other federal and state appellate court that has addressed the issue.

I. NO REASON FOR CERTIORARI REVIEW EXISTS WHERE THE SUPREME JUDICIAL COURT'S DECISION UPHOLDING MASSACHUSETTS' DNA DATABASE STATUTE AS REASONABLE UNDER THE FOURTH AMENDMENT IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND OF EVERY FEDERAL CIRCUIT COURT AND STATE APPELLATE COURT THAT HAS ADDRESSED THE ISSUE.

A. *The Appellate Cases are Not in Conflict.*

The Court should not grant the writ of certiorari in this case because there is no conflict in the federal or state appellate caselaw, which is unanimous in upholding the reasonableness under the Fourth Amendment of obtaining DNA samples from persons convicted of designated offenses for the purpose of creating identification information.

All fifty states have passed legislation authorizing the collection of DNA samples from criminals convicted of designated crimes and are eligible to participate in the nationwide sharing of DNA identification information. Nicholas Wade, *F.B.I. Set To Open Its DNA Database for Fighting Crime*, N.Y. Times, Oct. 12, 1998, at A1, A16. Every federal and state appellate court that has considered a challenge to a statute authorizing seizure of DNA

samples on Fourth Amendment grounds has upheld the statute. *See Roe v. Marcotte*, 193 F.2d 72, 1999 WL 731599 at *6-9 (2d Cir. 1999); *Boling v. Romer*, 101 F.3d 1336, 1340 (10th Cir. 1997); *Rise v. Oregon*, 59 F.3d 1556, 1560 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1554 (1996); *Jones v. Murray*, 962 F.2d 302, 306 (4th Cir.), *cert. denied*, 506 U.S. 977 (1992); *People v. Wealer*, 264 Ill. App.3d 6, 17, 636 N.E.2d 1129, 1137, *appeal denied*, 264 Ill. 2d 519, 642 N.E.2d 1299 (1994); *Cooper v. Gammon*, 943 S.W.2d 699, 704-705 (Mo. Ct. App. 1997); *State ex rel. Juvenile Dep't v. Orozco*, 129 Or. App. 148, 153-154, 878 P.2d 432, 434 (1994) (en banc), *review denied*, 326 Or. 58, 944 P.2d 947 (1997); *State v. Olivas*, 122 Wash.2d 73, 98, 856 P.2d 1076, 1093 (1993) (en banc).

B. *The Supreme Judicial Court's Decision Is Fully Consistent with the Holdings of This Court.*

The petitioners do not attempt to claim that there is a split among the lower federal courts or state appellate courts on this issue. Rather, they argue that the decision of the Massachusetts Supreme Judicial Court, and by implication all the above decisions, conflict with the holdings of this Court, particularly those in *Schmerber v. California*, 384 U.S. 757, 768 (1966) and *Winston v. Lee*, 470 U.S. 753, 761 (1985). In *Schmerber*, this Court required a showing of probable cause to believe a suspect had committed a crime before blood could be withdrawn involuntarily to determine intoxication. In *Lee*, this Court, following the reasoning of *Schmerber*, required a showing of both probable cause and compelling need before surgery could be ordered to remove a bullet from a suspect. The petitioners argue that these cases, and others in which searches or seizures were sought based on varying degrees of individualized suspicion focusing upon a particular suspect,[10] stand for the proposition that

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[10]E.g., *Terry v. Ohio*, 392 U.S. 1, 21n.18 (1968); *Ybarra v. Illinois*, 444 U.S. 85, 91-92 (1979); *Cupp v. Murphy*, 412 U.S. 291, 294-296 (1973).

extraction of a blood sample in any context relating to crime detection is prohibited in the absence of probable cause. Petition at 12-23.

This argument is simply incorrect. Both *Schmerber* and *Lee* involved criminal investigations in which the purpose of the seizures was to link a suspect with a particular crime. These cases do not address the reasonableness of obtaining a blood sample solely for other legitimate governmental purposes.[11]

The petitioners virtually ignore this Court's decisions regarding the evaluation of reasonableness of seizures under the Fourth Amendment in circumstances where there is not an ongoing criminal investigation in which a particular person is sought to be connected to the crime. The Supreme Judicial Court's decision is entirely consistent with these decisions, which hold that:

> [A] showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable. In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.

Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 624 (1989) (upholding mandatory breath, blood, and urine sampling of railroad workers); *see National Treasury Employees Union v. Von*

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[11]The petitioners attempt to bring the Act within the holdings of *Schmerber* and *Lee* by arguing that the obtaining of DNA samples must be seen not only as the collection of identification information regarding convicted persons, but also as part of the process of identifying a suspect in a criminal investigation, regardless of whether any "match" ever occurs (Petition at 10-11). This is sophistic -- the DNA samples are not collected as part of an ongoing criminal investigation, but in order to create a vehicle for later identification, exactly as fingerprints are collected.

Raab, 489 U.S. 656, 665 (1989) (upholding mandatory urinalysis of certain Customs Service employees; "neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance").

Under these cases, in circumstances where it is not possible to rely upon individualized suspicion,[12] the reasonableness of a suspicionless search under the Fourth Amendment, is evaluated by balancing the importance of the governmental interest involved against the justifiable privacy interests at stake. *See Skinner*, 489 U.S. at 628 (balancing compelling need for safe operation of trains against limited threats to covered employees' expectations of privacy).

The Massachusetts Supreme Judicial Court properly followed this analysis. The Court held:

> The State has an established and indisputable interest in preserving a permanent identification record of convicted persons for resolving past and future crimes and uses fingerprints, and now will use DNA identification, for these purposes. The obtaining of a very small amount of blood by pin prick constitutes only a minimally intrusive search. The balance of interests clearly weighs in favor of the use of DNA in accordance with the Act to create a record of identification.

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[12]Patently, the creation of DNA databases "would be placed in jeopardy by a requirement of individualized suspicion," *Skinner*, 489 U.S. at 624. The petitioners do not attempt to argue that, in collecting DNA samples from designated prisoners, parolees, and probationers in order to create a data bank of their identification information for use in solving crimes and missing person cases in the future, it is possible to develop individualized suspicion at the time of collection. Indeed, the crimes sought to be solved may not yet have been committed. A DNA database comprised only of samples collected from suspects in connection with particular investigations would be virtually useless.

Landry v. Attorney General, 429 Mass. 336, 347, 709 N.E.2d 1085, 1092 (1999) (citations omitted). This holding correctly applied the decisions of this Court. That DNA databases serve "an important governmental interest," *Skinner*, 489 U.S. at 624, is beyond dispute. The extreme accuracy of DNA identifying information not only permits cases to be solved with a high degree of reliability, even where there had been no suspect, but also permits persons to be eliminated from suspicion. DNA analysis enables crimes to be solved based upon extremely small samples of bodily fluids, skin, or hair follicles, a particularly useful quality where criminals may go to great efforts to conceal their identities. *See Jones v. Murray*, 962 F.2d at 307. Moreover, the fear of unwittingly leaving behind tiny amounts of incriminating evidence may deter crime. *See Rise v. Oregon*, 59 F.3d at 1561 & n.4.

The Supreme Judicial Court correctly balanced this governmental interest in "a particularly reliable form of identification," *Landry*, 429 Mass. at 345, 709 N.E.2d at 1091, against the particular privacy interests implicated by the search and the intrusiveness of the seizure, *Skinner*, 489 U.S. at 624; *Von Raab*, 489 U.S. at 671-72; *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 448-50 (1990). *See Landry*, 429 Mass. at 345, 709 N.E.2d at 1091.

Citing decisions of this Court, the Supreme Judicial Court properly held that the degree of intrusion involved in a blood test, especially one accomplished, as here, by a finger prick,[13] is minimal. *Id.* at 347, 709 N.E.2d at 1092; *see Schmerber*, 384 U.S. at 771; *Skinner*, 489 U.S. at 625 and cases cited; *cf. Lee*, 470 U.S. at 761-62, 766-67 (contrasting minimal intrusion of blood test with substantial intrusion of proposed surgery to retrieve bullet).

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[13]Under the DNA database statute and Department of State Police regulations, DNA samples are collected by medical or licensed personnel. The offender's finger is pricked using a sterile lancet and between two and eight drops of blood are allowed to fall on specialized paper that bonds DNA. *See* 515 C.M.R. § 1.04 (3).

As to privacy, the Supreme Judicial Court correctly held that "convicted persons, unlike other citizens, have a diminished expectation of privacy in their identity." *Landry*, 429 Mass. at 345, 709 N.E.2d at 1091; *see Jones v. Murray*, 962 F.2d at 306. This Court has recognized that persons convicted of crime have a lesser expectation of privacy than do ordinary law abiding citizens, even with respect to their bodily integrity. *Hudson v. Palmer*, 468 U.S. 517, 530 (1984) (convicted prisoners not protected from routine searches of body cavities and jail cells); *Bell v. Wolfish*, 441 U.S. 520, 558-60 (1979) (permitting body cavity search of inmates for contraband); *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (permitting search of probationer's house, without probable cause or a warrant, to search for contraband); *see Dunn v. White*, 880 F.2d 1188, 1195 (10th Cir. 1989), *cert. denied*, 493 U.S. 1059 (1990) (in upholding HIV testing against inmate's Fourth Amendment challenge, stating that "plaintiff's privacy expectation in his body is further reduced by his incarceration"). As the court stated in *Rise v. Oregon*, 59 F.3d at 1560:

> Once a person is convicted of [a serious crime], his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from the blood sampling.

Id. at 1560. Especially in light of the stringent limitations on the analysis and dissemination of DNA samples in the regulations promulgated pursuant to the Massachusetts DNA database statute (*see* Resp. App., *post*, at 8a-24a), a convicted person has no reasonable expectation of privacy in the identification information generated from the sample, which can reveal no other genetic information.[14]

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[14]STR identity testing involves loci that do not reveal general genetic information, and is thus well suited for forensic work. *See* National Research Council, The Evaluation of Forensic DNA Evidence 117 (1996).

C. *The "Special Needs" Doctrine Also Supports the Supreme Judicial Court's Decision.*

The petitioners argue that, under *Chandler v. Miller*, 520 U.S. 305, 308-09 (1997), a balancing test or "special needs" analysis may not be undertaken in this case because law enforcement interests are at stake (Petition at 21-23). This argument misconstrues *Chandler*.

The Supreme Judicial Court recognized in *Landry* that some courts have upheld DNA database statutes based on the "special needs" doctrine under the Fourth Amendment, *see, e.g.*, *Roe v. Marcotte*, 193 F.2d 72, 1999 WL 731599 at *6-9 (2d Cir. 1999); *State v. Olivas*, 122 Wash.2d 73, 98, 856 P.2d 1076, 1093 (1993) (en banc). *Landry*, 429 Mass. at 345-46, 709 N.E.2d at 1091-92. Although the Court did not reach the issue, relying instead on the "balancing" test under *Skinner*, this doctrine also supports its decision.

The "special needs" doctrine recognizes that "[s]earches conducted without grounds for suspicion of particular individuals have been upheld . . . in certain limited circumstances." *Chandler v. Miller*, 520 U.S. at 308-09 (citing *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 448-50 (1990); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989); *Brown v. Texas*, 443 U.S. 47, 50 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 557 (1976)). The *Chandler* Court also quoted from *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 624 (1989) (*see supra* at 10), holding that, where privacy interests are minimal and an important governmental interest would be jeopardized if a requirement of particularized suspicion were imposed, "a search may be reasonable despite the absence of such suspicion." *Id.*

In *Chandler*, however, this Court held that the claimed need for drug testing of candidates for public office was neither substantial nor important enough to override the individual candidates' privacy interests, in the absence of individualized suspicion. *Id.* at 318. The Court's statement that the "special

needs" recognized by this doctrine were "beyond the normal need for law enforcement" and involved "concerns other than crime detection," *id.* at 313-314, must be read as a clarification that routine law enforcement investigations require individualized suspicion or probable cause to justify a search. There is no indication that this Court in *Chandler* intended to overrule *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 448-50 (1990), in which a sobriety roadblock program, designed to deter and detect drunken driving, was upheld as reasonable, despite the absence of individualized suspicion. The same argument was made in *Sitz*, 496 U.S. at 450, and this Court rejected any requirement that the governmental interest at stake must be outside the needs of criminal law enforcement.

D. *The Massachusetts Courts Did Not Address the Petitioners' Claims Regarding Possible Future Breaches of Confidentiality, and Such Claims Are Speculative and Non-Justiciable.*

The petitioners also argue that certiorari should be granted because of the possibility that the Act's provisions for confidentiality and restrictions on analysis and dissemination of DNA information may be breached or changed at some time in the future (Petition at 23-27).[15] Neither the Massachusetts Supreme

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[15]The protections in the Act and regulations to safeguard confidentiality and to prevent gathering unauthorized DNA information are stringent. Use of STR identity testing methods is particularly protective of privacy because STR loci do not contain functional genetic information, so they cannot reveal any characteristics of a person other than identification. *See* National Research Council, *The Evaluation of Forensic DNA Evidence* 65 (1996); Edward G. Burley, Note, *A Study in Scarlet: Criminal DNA Typing Reaches the Courts and Legislatures*, 6 J.L. & Politics 755, 823 (1990). Only identification information may be produced from the samples, and use of that information is limited to law enforcement and identification purposes. 515 C.M.R. §§2.12-2.13 (1998); Mass. Gen. Laws ch. 22E, §§ 1, 10 (1997). The DNA samples themselves may not be shared, and are stored in a secure storage room explicitly constructed for this

Judicial Court nor the Superior Court addressed these issues. *See Landry v. Attorney General*, 429 Mass. 336, 354, 709 N.E.2d 1085, 1096 (1999); memorandum of decision of Superior Court (Pet. App. at 27a-51a).

Moreover, the constitutionality of possible future legislation, and the constitutionality of the current Act in light of possible future violation of its provisions, are speculative and do not present a live controversy under Article III. *See International Longshoremen's and Warehousemen's Union, Local 37 v. Boyd*, 347 U.S. 222, 224 (1954) (request for determination of constitutionality of statute in context of possible future conduct "involves too remote and abstract an inquiry for the proper exercise of the judicial function").

II. THIS IS NOT A PROPER CASE FOR CERTIORARI REVIEW WHERE THE ORDER SOUGHT TO BE REVIEWED, VACATING A PRELIMINARY INJUNCTION, IS MOOT BECAUSE FINAL JUDGMENT HAS ENTERED AND THE TIME FOR APPEAL HAS EXPIRED.

This case is moot because it is an interlocutory appeal from a preliminary injunction, final judgment has entered, and the time for appeal has expired. The case has thus "lost its character as a present, live controversy," *Hall v. Beals*, 396 U.S. 45, 48 (1969), and is not justiciable under Article III.

Under Massachusetts law, a preliminary injunction lapses upon entry of a final judgment. *See Judge Rotenberg Educ. Center v. Comm'r of Dep't of Mental Retardation*, 424 Mass.

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purpose. *See* Affidavit of David I. Ranieri, ¶ 16 (Resp. App. at 6a). In addition, the Supreme Judicial Court, has interpreted the Act to restrict the records that may be shared with police departments to identification information only. *Landry v. Attorney General*, 429 Mass. 336, 353 n.18, 709 N.E.2d 1085, 1096 n.18 (1999). Willful breaches of these rules are criminally punishable. Mass. Gen. Laws ch. 22E, §§ 12-13 (1997).

471, 472, 677 N.E.2d 153, 154 (1997) (appeal from preliminary injunction dismissed as moot upon entry of final judgment). Here, the preliminary injunction was issued by the Superior Court and vacated by the Supreme Judicial Court on interlocutory appeal. *Landry v. Attorney General*, 429 Mass. 336, 354, 709 N.E.2d 1085, 1096 (1999). The Supreme Judicial Court remanded the case to the Superior Court "for further proceedings consistent with this opinion." *Id.* The Superior Court then dismissed the complaint in its entirety, dismissing not only the Fourth Amendment claims that had been raised in connection with the preliminary injunction, but also a number of other federal and state constitutional and statutory claims that were not raised in the interlocutory appeal from the preliminary injunction. Judgment entered on May 26, 1999, and reconsideration was denied on July 9, 1999. *See* Resp. App., *post*, at 25a-26a. Under the Massachusetts Rules of Appellate Procedure, the time for appeal has expired. *See* Mass. R. App. P. 4 (a) (notice of appeal must be filed within sixty days of entry of judgment where the Commonwealth is a party). Where the judgment is final, issues arising on review of the order vacating the preliminary injunction are moot.

Conclusion

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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December 2, 1999

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APPENDIX A

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 98-462

DONALD E. LANDRY, et al.,

Plaintiffs,

v.

SCOTT HARSHBARGER, ATTORNEY GENERAL, et al.,

Defendants.

AFFIDAVIT OF DAVID A. RANIERI

I, David A. Ranieri, depose and state as follows:

1. I am employed as a Detective Captain in the Massachusetts Department of State Police (the "Department"). I have been a State Police officer for the past 26 years.

2. I am currently assigned as Bureau Commander of the Department's Bureau of Forensic Services. In my command are the State Police Crime Lab, State Police Crime Scene Services Section, State Police Firearms Identification Section, State Police Polygraph Section, and State Police Behavioral Science Section.

3. In my capacity as Bureau Commander, I was assigned to oversee and coordinate the efforts of the Department and other agencies involved in the implementation of G.L. c. 22E,

the State DNA Database statute, which was enacted September 30, 1997.

4. Chapter 22E provides that persons convicted of certain offenses designated in the statute are required to submit a DNA sample to the Department within ninety days of their conviction. Further, persons who have been convicted of a designated offense, notwithstanding the date of that conviction, and were incarcerated on the effective date of the statute (December 29, 1997), are required to submit a DNA sample to the Department within ninety days of the effective date. Persons on parole or probation as a result of a conviction of a designated offense are also required to submit a DNA sample to the Department within ninety days of the effective date.

5. The intent of c. 22E is to establish an identification index of DNA profiles from individuals convicted of designated offenses. Evidence recovered in conjunction with criminal investigations will be analyzed for its DNA profile and then compared to the DNA profiles included in the database in an effort to establish the identity of the perpetrator or a link with other cases.

6. Because of the ninety-day time limit imposed by c. 22E for the submission of DNA samples from certain designated offenders, an initial focus of our efforts has been to identify and notify individuals who must submit a sample, and to develop protocols and procedures for the collection of samples.

7. There are approximately 10,000 offenders who initially must submit a DNA sample pursuant to the legislation by March 29, 1998 (about 7,000 of whom are currently incarcerated). Additionally, an estimated 1,500 persons are convicted of designated offenses in Massachusetts annually. The Department of State Police has worked closely with the Department of Corrections, the Office of the Commissioner of

Probation, the Parole Board, the Criminal History Systems Board, the National Guard, and all of the county sheriffs with respect to identification and notification processes.

8. Probationers and parolees, who are being supervised in the community, were notified of their obligation to submit a DNA sample pursuant to c. 22E. Their notification provided instructions to contact the State Police Crime Lab at a toll-free telephone number (888-877-4DNA) to schedule an appointment to submit the sample. At present, National Guard sites in each region of the Commonwealth have been made available, on specific dates, for sample collection. Individuals required to submit samples have been given the opportunity to select the site and date most convenient for them and to reschedule their appointments if necessary.

9. As of this date, as a result of calls to the toll-free number, approximately 1,100 appointments have been scheduled through March 25, 1998.

10. The other focus of our efforts has been to establish protocols and procedures for the collection of DNA samples. This process has involved consultation and extensive research in connection with numerous federal and state law enforcement agencies; with Tri-Tech, Inc., the company chosen to manufacture the DNA collection kit for Massachusetts; and with scientific consultants, including Dr. Frederick Bieber and Dr. John Ballantyne. Drs. Bieber and Ballantyne recommended that the DNA collections be made by executing a simple finger stick and then spotting the blood on FTA paper. This method is scientifically valid, less intrusive for the offender than venipuncture, which is used by most other states, and provides for the easy storage of samples. Blood can be stored on FTA paper indefinitely at room temperature.

11. As a result of the research conducted and the consultations described above, protocols and procedures were developed for the collection of DNA samples.

12. The Massachusetts State Police DNA collection kit was also designed as a result of this research. The kit contains all items necessary to perform the collection and to comply with the collection procedure. Each kit includes a blue instruction sheet on which the protocols and procedures for collection are clearly described. Ten thousand of these kits have been purchased and delivered, and another five thousand have been ordered.

13. For the collection of DNA samples, the Department has contracted with two health care providers. Corrections Medical Services, Inc., of Dedham, will be responsible for collections in Department of Correction Facilities, and Health Resources, of Woburn, will be responsible for collections in houses of correction and from designated parolees and probationers. The contracts provide that all blood collection personnel must be trained and licensed in accordance with c. 22E, and that all applicable state and federal statutes, rules, and regulations relative to blood collection will be followed.

14. The Department conducted training sessions for all personnel to be involved in DNA collection, including correctional employees and personnel from Corrections Medical Services and Health Resources, on January 14, 21, 27, and 29, 1998. These sessions covered all aspects of the collection process, including the procedures and protocols for DNA collection described on the blue instruction sheets, as well as the proper marking and identification of samples for forwarding to the State Police Crime Lab.

15. Collections commenced at Department of Correction facilities on January 24, 1998, and are ongoing. Collections from probationers and parolees began February 4,

1998, at the Dorchester Armory. To date, at total of 1,254 samples have been collected.

16. At present, DNA samples are being stored at the State Police Crime Lab in Sudbury, in a secure storage room, newly constructed for the express purpose of storing DNA samples. Upon receipt, DNA samples are logged in and stored in this room in accordance with standard Crime Lab operating procedures, as described in the Department of State Police Crime Laboratory Guidelines for Submitting Evidence. Although, the DNA samples are not evidentiary in nature, they are being handled with all the care ordinarily used for the storage of evidence.

17. The State Police has not yet begun the process of analyzing DNA samples for eventual inclusion in the database. At this time, no funding has been appropriated to advance beyond the collection phase. After the appropriation of the necessary funds, it will be necessary to establish or contract with a service to conduct DNA analysis.

18. On or about April 6, 1998, Dr. John Ballantyne will join the Department as Director of the Massachusetts State Police Crime Lab. Dr. Ballantyne heads the DNA unit in the office of the Suffolk County (New York) Medical Examiner and is member of the FBI's DNA Advisory Board. Among his first duties for the Department will be to establish procedures for DNA analysis and a quality assurance program. In addition, Dr. Frederick Bieber will assume part-time duties as Director of Forensic Science.

19. All DNA analysis conducted by or for the Department will be under the direction of Drs. Ballantyne and Bieber and in compliance with procedures established by them and also in compliance with established FBI TWGDAM (Technical Working Group on DNA Analysis Methods) guidelines.

20. DNA records are no different from fingerprints. When a fingerprint is found at a crime scene, it can be compared to fingerprints which have been taken in conjunction with arrests and are sometimes stored in automated databases. Similarly, a match of a DNA profile derived as the result of the analysis of biological evidence recovered at a crime scene and a DNA profile contained in the convicted offender index can be used to establish cause to justify further investigation of a suspect.

Signed under penalties of perjury this 5th day of February, 1998,

/s/
David A. Ranieri

APPENDIX B

CODE OF MASSACHUSETTS REGULATIONS

TITLE 515: DEPARTMENT OF STATE POLICE

515 CMR 2.00: TESTING AND ANALYSIS, QUALITY ASSURANCE, COMPUTERIZED STORAGE, RETRIEVAL, AND DISSEMINATION FOR THE STATE DNA DATABASE

Current with amendments received through Register Number 867

REGULATORY AUTHORITY
515 CMR 2.00: M.G.L. c. 22E, §§ 4 and 6.

Section
2.01: Purpose
2.02: Scope and Applicability
2.03: Definitions
2.04: Forensic DNA Testing and Analysis
2.05: Quality Assurance
2.06: Verification Analysis
2.07: Security Features Preventing Unauthorized Access
2.08: Prevention of Illegal Disclosures
2.09: Restriction of Access to Information Systems
2.10: Inquiry, Update or Destruction of Records
2.11: Systems' Safeguard Certification
2.12: Right of Subjects to Access and Review Records
2.13: Use and Dissemination Agreements
2.14: Mutual Exchange, Use and Storage of DNA Records
2.15: Expungement of DNA Records
2.16: Severability

2.01: Purpose

The purpose of 515 CMR 2.00 *et seq.* is to provide rules and regulations governing technical specifications for the testing and analysis of blood samples, quality assurance, and computerized storage, retrieval, and dissemination of DNA profiles in the Massachusetts DNA Database, pursuant to the terms and provisions of M.G.L. c. 22E.

2.02: Scope and Applicability

The Director of the Massachusetts State Police Crime Laboratory, under the authority of M.G.L. c. 22E, adopts 515 CMR 2.00 *et seq.* to establish rules and regulations as described in that statute.

2.03: Definitions

AFIS. Automated Fingerprint Identification System, which is a computerized database allowing for the rapid search, retrieval and comparison of fingerprints on record at the Department with those fingerprints obtained from other sources.

Allele. One of the possible alternate forms of the DNA residing at a particular genetic locus; different alleles of STR loci are distinguished by having repetitive regions that differ in length.

ASCLD/LAB. The American Society of Crime Laboratory Directors/Laboratory Accreditation Board. Current ASCLD/LAB accreditation guidelines are contained in the most recent edition of the ASCLD/LAB Manual.

Casework Evidence DNA profile. That DNA profile of undetermined origin generated by the testing of physical evidence.

CODIS/Combined DNA Index System. The Federal Bureau of Investigation's national DNA identification index system which facilitates the storage and exchange of DNA records submitted by state and local criminal justice and law enforcement agencies.

Positive Control Sample. A reference DNA sample available from the National Institute for Standards and Technology for which the DNA STR profile is known, and which is used to demonstrate acceptable performance of DNA STR tests.

Convicted Offender DNA Profile. That DNA profile generated by testing of a blood sample collected from a designated offender convicted of one of the crimes listed in M.G.L. c. 22E, §3.

Convicted Offender Index. The electronic database containing DNA STR profiles generated from Massachusetts offenders convicted of one of the crimes listed in M.G.L. c. 22E, §3, stored in the State DNA Index System (SDIS).

Crime Laboratory. Massachusetts State Police Crime Laboratory of the Department of State Police.

Database Coordinator. An employee of the Department responsible for, among other duties, ensuring that all administrative requirements related to the DNA Database (as enumerated in 515 CMR 2.00 *et seq.*) are met by all participant laboratories and user agencies.

Department. The Department of State Police.

Director. The Director of the Massachusetts State Police Crime Laboratory, or his or her designee.

DNA. Deoxyribonucleic acid.

DNA Database. The DNA identification records system maintained and administered by the Director.

DNA Profile. The list of alleles carried by a particular individual at a specified set of genetic loci.

DNA Record. DNA information that is derived from a DNA sample and DNA analysis and is stored in the state DNA database, or in CODIS including all records pertaining to DNA analysis but not including the DNA sample itself.

DNA Sample. Biological evidence of any nature from which DNA is recovered and subjected to DNA analysis.

FBI. Federal Bureau of Investigation.

Forensic DNA Testing. Any test that employs techniques to examine DNA derived from the human body for the purpose of providing information to resolve issues of identification.

Forensic Index. The electronic database containing DNA STR profiles generated from casework evidence, stored in the SDIS.

Loci. A group of genes or other DNA elements occupying specific locations on one or more of the chromosomes of a particular species.

Mass Disaster. A catastrophic event resulting in a large number of deaths.

Missing Person. A person reported as such in a report to a law enforcement authority.

NDIS. As developed by the FBI, refers to the National DNA Index System, and is comprised of uploaded casework ("forensic") profiles and convicted offender DNA profiles from across the United States.

Negative Amplification Blank. A negative control sample containing amplification reagents without added DNA, which is used to detect DNA contamination of the amplification reagents during this testing.

Negative Control. A specimen included in a batch of specimens which, when tested using DNA testing methods, should give rise to negative test results.

Negative Reagent Blank. A negative control sample containing all testing reagents without added DNA, which is used to detect DNA contamination of any reagent during this testing.

SDIS. As developed by the FBI, refers to the State DNA Index System, and is comprised of uploaded casework ("forensic") and convicted offender DNA records, and DNA records for missing persons.

SDIS Index Custodian. An employee of the Department responsible for, among other duties, maintaining the SDIS, fulfilling technical requirements of CODIS, and proper operation of the computer hardware on which the DNA Database resides. The SDIS Index Custodian and Database Coordinator may be the same person.

STR/Short Tandem Repeat. A form of testing which provides DNA profiles for loci which contain simple DNA unit repeats.

TWGDAM. Technical Working Group on DNA Analysis Methods within the FBI.

2.04: Forensic DNA Testing and Analysis

(1) STR Testing: The DNA Database shall be comprised of data generated from STR testing. The specific tests to be adopted for such use shall include all STR loci approved for use by the Director. The FBI-sponsored Short Tandem Repeat (STR) Standardization Project's set of core loci, required for participation in NDIS, is required for inclusion of a DNA profile for a convicted offender in the DNA Database.

(2) Analysis: Forensic DNA profiles to be maintained in the DNA Database must be comprised of information for at least six of the set of core loci. This requirement for a minimum of six loci applies only to those forensic DNA profiles which the Crime Laboratory desires to have maintained in the forensic index of the DNA Database. The requirements for a minimum number of loci needed to perform a casework search of the DNA Database are set forth herein at 515 CMR 2.14. The Crime Laboratory shall only add to the DNA Database Casework Evidence DNA Profiles, Convicted Offender DNA profiles, or profiles generated from analyses of DNA recovered from unidentified human remains.

2.05: Quality Assurance

Quality Assurance will be accomplished through compliance with laboratory accreditation standards as

promulgated by the FBI's TWGDAM, pursuant to 42 U.S.C. § 13132(b), as updated.

2.06: Verification Analysis

(1) Positive Control Sample. In addition to compliance with TWGDAM standards, accuracy and completeness of all DNA records maintained as part of the DNA Database will be assured through compliance by the Crime Laboratory with the requirements for submission of a positive control sample with each profile or group of profiles. Each DNA profile (for either convicted offender or forensic samples) must be associated with a positive control sample. Before STR data may be entered into the DNA Database, the SDIS Index Custodian shall verify the affiliated positive control values against the acceptable values. The positive acceptability values applied shall be those determined and approved by the Director. In addition, the Crime Laboratory must certify that each DNA profile is associated with two negative controls (Negative Amplification Blank and Negative Reagent Blank) for which no activity was observed during analysis.

(2) Rejection. If the positive control values are not acceptable, the SDIS Index Custodian shall notify the Database Coordinator who shall notify the agency from which the DNA data was submitted. Rejection of positive control values shall be recorded in a Positive Control Verification Log in a form prescribed by the Director.

2.07: Security Features Preventing Unauthorized Access

(1) Security Features. The server on which the DNA Database resides shall be located in a secure area to minimize unauthorized physical access. The Crime Laboratory shall choose software and hardware designs

which prevent unauthorized access to DNA records, and must have a written Information Systems Plan which specifies the architecture of the laboratory's computer hardware and the structure of security features comprising the access control component of the computer software employed. The Information Systems Plan must demonstrate that an electronic audit trail is maintained for activities related to the entering or editing of DNA records.

(2) Systems Plan. A final Information Systems Plan shall be submitted by the Crime Laboratory for review and approval by the Department prior to the laboratory implementing the DNA Database. The Department shall determine the acceptability of the Information Systems Plan.

(3) Participation in CODIS. The Information Systems Plan components must be designed and applied in such a way as to allow the Crime Laboratory to participate in the federal CODIS program.

2.08: Prevention of Illegal Disclosures

(1) Annual Audit. At least once per year, an audit of the Crime Laboratory will be conducted by the Department to assure that no illegal disclosures of DNA records have taken place. Each audit will consist of administrative review of a random group of at least 10% of the Crime Laboratory's DNA Database search requests generated during the period since the last audit.

(2) Audit Parameters. This audit will verify that all necessary documents required for accessing and controlling DNA records and their associated information have been appropriately completed. These documents

include, but are not limited to: use and dissemination agreements between the Crime Laboratory and user agencies or the Department; search request forms; and search result forms. The Department may develop a standardized audit checklist to assist in completion of the required audits.

2.09: Restriction of Access to Information Systems

Access to record information system facilities, systems operating environments and data file contents (whether while in use or when stored in a media library) shall be restricted to authorized personnel only. These restrictions shall be assured through compliance by the laboratory with specific laboratory accreditation criteria of the current ASCLD/LAB manual governing security.

2.10: Inquiry, Update or Destruction of Records

(1) Restrictions of Access. Inquiries, updates, or destruction of DNA records in the DNA Database shall only be made by authorized sources of inquiry, update, or destruction. Inquiries related to DNA records in the DNA Database may be accepted only from a subject of the DNA Database (see 515 CMR 2.12); an agency authorized to make such inquiry pursuant to a properly executed use and dissemination agreement (see 515 CMR 2.13); or the FBI (see 515 CMR 2.14).

(2) Record keeping. Update or destruction of records shall only be made by an authorized agent of the Crime Laboratory or its designee. Any update to, or destruction of, a DNA record in the DNA Database shall be recorded in a log following an electronic or hard copy form prescribed by the Director.

2.11: Systems' Safeguard Certification

(1) Certification. Operational programs shall be used to detect and store for the output of the Department or its designee all unauthorized attempts to penetrate the DNA Database. The Department shall certify that the DNA Database hardware and software architecture has been appropriately designed, implemented and safeguarded to eliminate the realistic chance that such unauthorized attempts to penetrate the DNA Database could go undetected. This certification shall be made based on conformance of the DNA Database with all appropriate portions of appropriate CODIS standards.

(2) Record keeping. The Department shall maintain this certification in a file with the written Information Systems Plan (see 515 CMR 2.07). A current certification must be on file at the Department at all times.

2.12: Right of Subjects to Access and Review Records

(1) Subject Request for Access. All requests for access to and review of records relating to a subject of the DNA Database, by such subject, will be reviewed on a case-by-case basis by the Director. In reviewing and responding to the request, the following steps shall be followed:

(a) The subject must provide in writing his/her name; any aliases used; Date of Birth; Social Security Number; Sex; Race; Date of sentence for the index offense (if known); the jurisdiction of the Court which sentenced the subject (if known); imprints of the right thumbprint having sufficient clarity to allow for AFIS processing; a passport-

sized color photograph taken within the past 12 months; current address; and current phone number (if available). This information must be submitted under the subject's signature and seal of a registered Notary with the following authentication statement: "I [name] on oath depose and state that the information I am providing to the Director of the Massachusetts State Police Crime Laboratory regarding my identity is true and accurate."

(b) The Director will verify whether a blood specimen was ever collected from an individual corresponding to such information provided in 515 CMR 2.12(a). If needed, the Director shall use other computerized databases within the authority of or available to the Department to assist in fulfilling the subject's request.

(c) If no record is found using this information, or if there is any discrepancy discovered in the information submitted by the subject in the request, no information related to the DNA Database will be provided to the subject. The subject will be notified of this decision by the Director in writing within 30 days, by certified or registered mail, return receipt requested.

(d) If a record is found for the identified subject in the DNA Database and no discrepancies are identified in the submitted information, a photocopy of the DNA Database submission form and the results of the DNA analysis for the subject will be noted. The Director will forward this information with a written letter of authentication

within 30 days, by certified or registered mail, return receipt requested.

(2) Appeal. If, due to discrepancies in the information submitted by the subject in the request, DNA records and related information are not provided to the subject by the Director, the subject is allowed to appeal the decision. In order to appeal the Director's decision, the subject must provide, in writing and under signature and the seal of a registered Notary, the nature of the subject's disagreement with the Director's decision. This appeal document shall be submitted to the Department, which shall take appropriate action to review the merits of the appeal and present a final decision on the appeal in writing within a reasonable period. In the event such decision reverses or modifies that of the Director, the Department shall require that appropriate action be taken with respect to the subject's record.

2.13: Use and Dissemination Agreements

(1) Authorized Agencies. Access to the DNA Database shall be granted to an agency authorized to have such access, pursuant only to a written use and dissemination agreement. As long as consistent with 42 U.S.C. §14132, stored DNA samples and DNA analyses can be disclosed only:

(a) to criminal justice agencies for law enforcement identification purposes, which shall include (at the discretion of the Director) to assist the identification of human remains from mass disasters or to identify whether such remains are from those of a missing person, upon written or electronic request to the Director;

(b) in judicial proceedings, if otherwise admissible pursuant to applicable statutes or rules;

(c) for criminal defense purposes, to a defendant, who shall have access to samples and analyses performed in connection with the case in which such defendant is charged; and

(d) if personally identifiable information is removed, for a population statistics database, for identification research and protocol development purposes, or for quality control purposes.

(2) Record keeping. A copy of each current use and dissemination agreement shall be filed with the Crime Laboratory and maintained in a file for each participant agency at all times. The form of the agreements shall be determined by the Department.

(3) Requirement in the Use and Dissemination Agreement. The use and dissemination agreement shall specify:

(a) Duties of the Director to provide the requested access and information to authorized parties;

(b) Duties of the user agency to receive, store and use all information covered by the agreement in compliance with all applicable State and federal laws and regulations;

(c) Duties of the user agency to familiarize all personnel and adhere to all regulations governing the receipt, storage and use of all information covered in the agreement;

(d) Duties of the user agency to maintain records that support and justify inquiries and requests for DNA Database searches, and make these records available to the Department during periodic audits performed by the Department;

(e) Prohibitions on redisclosure by the user agency of any information obtained from the DNA Database to any unauthorized agency or person;

(f) Specific policy for suspension of access, cancellation of access and/or fines for any violations of the terms and conditions of the use and dissemination agreement by a user agency, its employees or agents, and a policy for reinstating access or service by the Department only after the Department is satisfied that the causes of all violations have been eliminated;

(g) Specific instructions allowing termination by either party of the agreement for any reason, with 30 days notice; and

(h) Notice that the agreement shall take effect only after officials of the Crime Laboratory and user agency having both the administrative and legal authority to bind the parties to the terms and conditions of the agreement have signed the use and dissemination agreement.

2.14: Mutual Exchange, Use and Storage of DNA Records

(1) Mutual Exchange, Use and Storage. Mutual Exchange, Use and Storage of DNA records within the DNA Database with the system of DNA identification by the FBI shall be allowed, provided that:

(a) The Department determines that such exchange, use and storage are consistent with the provision of applicable provisions of Massachusetts law;

(b) Applicable requirements enumerated within 515 CMR 2.04 through 2.15 have been met; and

(c) A memorandum of understanding has been executed between the Director and the federal CODIS program administrator.

(2) Loci Requirements. For purposes of searches of the DNA Database, a minimum of four loci shall be provided by a laboratory or other authorized agency requesting a casework (forensic) search against the DNA Database. Notwithstanding this requirement, the laboratory or other authorized agency may, at its discretion, request that a search be performed using fewer loci if there are scientific reasons which support using fewer than four loci in a particular case, including but not limited to the apparent presence of mixtures, sample degradation, limited sample availability, or the possible involvement of relatives. The opinion that such "scientific reason(s)" are operative in a case must be affirmed on the search request form whenever fewer than four loci are provided with a casework search request.

2.15: Expungement of DNA Records

(1) Expungement. Upon receipt of a court order pursuant to M.G.L. c. 22E, § 15, with respect to a subject whose DNA record resides in the DNA Database such record may be expunged in accordance with M.G.L. c. 22E, § 15. If the Director is so notified:

(a) The Director shall verify whether a blood specimen was ever collected from an individual with personal identifying data which corresponds with information provided in 515 CMR 2.12(1)(a). If needed, the Director shall use other computerized databases within the authority of, or available to, the Director to assist in fulfilling the subject's request.

(b) If no record is found using this information, or if there is any discrepancy discovered in the information submitted by the subject or his or her representative in the request, the Director shall notify the subject in writing within 30 days, setting forth reasons why documents were not returned and requesting additional information, if appropriate, by certified or registered mail, return receipt requested.

(c) If a record is found for the identified subject in the DNA Database and no discrepancies are identified in the submitted information, the Director shall determine the location and extent of all documents related to the subject's DNA record. The list of documents identified in this search will be communicated by the Director to the subject in writing within 30 days of the notification of need for expungement, by return receipt requested mail. In this same letter, the Director shall define for the subject the expected time needed to obtain all copies of all documents to be returned to the subject. The time to obtain and return these records to the subject shall not exceed 120 days from the date of notification of the need for expungement unless exigent circumstances can be documented.

(d) The Director shall thereafter obtain all documents related to the subject's DNA Database record. After insuring that all documents, and all copies thereof, have been obtained, these records shall be catalogued (but no copies of the actual documents shall be made). These documents shall be forwarded to the subject of the expungement using return receipt requested mail.

(e) The catalogue of the documents returned to the subject or the subject 's representative shall be maintained with documentation of notification of the need for expungement and all related correspondence between the Director and the subject in a file at the Crime Laboratory.

(2) Sealed File. After completion of all activities by the Director related to this expungement, this file shall be sealed and maintained by the Crime Laboratory indefinitely and shall not be opened except pursuant to an order of a court of competent jurisdiction.

2.16: Severability

If any article, section, subsection, sentence, clause or phrase of 515 CMR 2.00 *et seq.* is for any reason determined to be unconstitutional, contrary to statute, in excess of authority, or otherwise inoperative, such determination shall not affect the validity of any other article, section, subsection, sentence, clause or phrase of 515 CMR 2.00 *et. seq.*

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF MIDDLESEX
THE SUPERIOR COURT

DOCKET#MICV98-00462A

RE: Landry et al v Harshbarger et al
TO: Gregory I Massing
Mass Atty General's Office
1 Ashburton Place
Criminal Bureau
Boston MA 02108

NOTICE OF DOCKET ENTRY

You are hereby notified that on 05/26/99 the following entry was made on the above referenced docket:

> JUDGMENT: "the preliminary injunction (of GL c 22E, Sections 1-15) cannot be justified on the grounds relied upon by the (Superior Court) judge, and that it also cannot be supported on the basis that the reasonable force provision (sec 4 (a)) is unlawful in the absence of regulations on the matter. Accordingly, we vacate the preliminary injunction." Id. The complaint is hereby ordered DISMISSED. FORM OF JUDGMENT APPROVED. (Zobel, J.) copies sent 5/26/99

Dated: 26th of May, 1999

Edward J Sullivan
Clerk of the Courts

BY: George M Loiacono, Asst Clerk
Telephone: 617-494-4010 EXT 4341

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF MIDDLESEX
THE SUPERIOR COURT

CIVIL DOCKET# MICV98-00462A

RE: Landry et al v Harshbarger et al

TO: Rosemary S Gale
Mass Atty General's Office
1 Ashburton Place
Criminal Bureau
Boston MA 02108

CLERK'S NOTICE

This is to notify you that in the above referenced case the Court's action on 07/09/99 is as follows:

Motion of pltffs to reconsider judgment and order of May 26, 1999.

Motion #49 of Pltffs To Reconsider (judgment and order of May 26, 1999) is: DENIED. (Zobel, J.) notices sent 7/9/99

Dated at Cambridge, Massachusetts this 9th of July, 1999.

Edward J Sullivan
Clerk of the Courts

BY: George M Loiacono, Asst Clerk
Location: Rm 12A (Cambridge)
Telephone: 617-494-4010 EXT 4341

(3)

No. 99-359

Supreme Court, U.S.
FILED
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

DONALD LANDRY, ET AL.,

Petitioners,

v.

TOM REILLY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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December 13, 1999

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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No. 99-359

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

DONALD LANDRY, ET AL.,

Petitioners,

v.

TOM REILLY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

I. PETITIONERS' CLAIM IS NOT MOOT.

This case is not moot. Respondents' contention that it is, Opp. Pet. 16-17, is premised on the procedural fact that, after issuance of the Supreme Judicial Court's decision, the matter was remanded to the Superior Court, where the complaint was dismissed. Resp. App. at 25a-26a. The "mootness" argument is

wrong for two reasons: (A) as a matter of law, the case is reviewable because the decision of the Supreme Judicial Court is "final" within the meaning of 28 U.S.C. § 1257(a), *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), and; (B) as a matter of fact, the final order of dismissal on which respondents' mootness argument hinges has been vacated by the Superior Court. See petitioners' supplemental appendix, *post*, at Supp. App. 19s.a.

A. The Supreme Judicial Court's ruling that the act "does not violate the Fourth Amendment," App. 11a, is a "[f]inal judgment or decree[] rendered by the highest court of a State" under 28 U.S.C. §1257(a), and is therefore within this Court's certiorari jurisdiction, despite the fact that the Supreme Judicial Court's rescript remanded the case to the Superior Court "for further proceedings consistent with" its opinion. App. 26a. In its present posture, this case falls squarely within the first category of cases described in *Cox Broadcasting Corp.*, *supra*: The Supreme Judicial Court's resolution of the Fourth Amendment question is "conclusive" of the entire case, and the outcome of any further proceedings that may be had in the state court is "preordained." 420 U.S. at 479. Furthermore, whatever further state court proceedings might take place cannot involve any other federal questions, see *id.* at 478, because petitioners have waived them. Supp. App. 20s.a.-23s.a.[1] Accordingly, the

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[1] Although petitioners' complaint alleged federal questions other than the Fourth Amendment claim presented here, see App. 31a-32a at n.4, petitioners have not claimed an appeal from the Superior Court's denial of their motion to reconsider the dismissal of their complaint, and do not intend to do so. Petitioners concede here, as they have in the trial court, Supp. App. 20s.a.-23s.a., that they have waived all claims raised in the amended complaint other than the Fourth Amendment claim raised in the instant petition. See, *Asarco Inc.* v. *Kadish*, 490 U.S. 605, 610-612 (1989) (state court decision "final" under § 1257, even though decision remanded case to state trial court for determination of other federal law questions, where respondents withdrew those requests on appeal); *American Export Lines, Inc.* v. *Alvez*, 446 U.S. 274, 277-279 (1980) (similar).

Supreme Judicial Court's resolution of the Fourth Amendment question must be "deemed final" within the meaning of § 1257(a). *Id.*, at 479 .[2]

B. After the Supreme Judicial Court issued its decision in this case, petitioners' moved to stay issuance of the rescript pending the filing and disposition of the instant petition. Supp. App. at 4s.a.-11s.a. That motion was rejected by the Supreme Judicial Court, which instead allowed respondents' motion to expedite issuance of the rescript. Supp. App. at 1s.a.-3s.a.; 12s.a.-13s.a. Accordingly, the rescript issued to the Superior Court, which, on May 26, 1999, dismissed the complaint, and

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[2] Relying exclusively on *Judge Rotenberg Educ. Center* v. *Comm'r of the Dept. of Mental Retardation (No. 2)*, 424 Mass. 471, 677 N.E.2d 153 (1997), respondents attempt to shore up their "mootness" argument with the assertion that, as a matter of state law, a "preliminary injunction lapses on entry of a final judgment." Opp. Cert. 16. This argument is disingenous.

In *Rotenberg* (*No. 2*), the defendants appealed a preliminary injunction which enjoined them from decertifying the plaintiff's authority to use aversive therapy on autistic children in plaintiff's care. *Id.*, citing *Judge Rotenberg Educ. Center* v. *Comm'r of the Dept. of Mental Retardation* (*No. 1*), 424 Mass. 430, 677 N.E.2d 127 (1997). While this appeal was still pending, the trial court, after a thirteen-day trial on the merits, entered a final judgment against the defendants, who appealed that ruling as well. *Rotenberg* (*No. 1*), 424 Mass. at 432-434, 677 N.E. 2d at 131. After first affirming the judgment against the defendants on the merits of the underlying controversy, *id.* at 464-465, 677 N.E. 2d at 150, the Supreme Judicial Court, in the second *Rotenberg* case relied upon by respondents here, dismissed the pending appeal from the allowance of the preliminary injunction because it was "moot." *Rotenberg* (*No. 2*), 424 Mass. at 472 & n. 4, 677 N.E. 2d at 154 (rejecting, "[f]or the reasons stated in [*Rotenberg* (*No. 1*)]," defendants' contention that the preliminary injunction had been entered erroneously).

Rotenberg (*2*) plainly has no application to this case, where the trial court dismissed the complaint as a direct result of the Supreme Judicial Court's ruling, which vacated the preliminary injunction petitioners' had obtained in the trial court, and which conclusively rejected the merits of the Fourth Amendment claim that petitioners seek to bring to this Court for review.

then denied petitioners' motion for reconsideration. Resp. App. at 25a-26a. Respondents believe that petitioners' failure to pursue an appeal from the judgment of dismissal renders the instant petition moot. Opp. Pet. at 17.

It would be a curious rule of law that enabled a party which had prevailed before a state's highest court on a dispositive question of federal law to insulate its victory from this Court's certiorari jurisdiction simply by securing a final judgment in the trial court before the losing side had time to have its petition considered. Nonetheless, in order to eliminate the procedural impediment perceived by respondents, as soon as petitioners received respondents' opposition, they presented the Superior Court with an emergency motion to vacate the final judgment and stay proceedings pending this Court's disposition of the case. Supp. App. at 14s.a.-18s.a. After a hearing, the Superior Court allowed the motion, while leaving the injunction dissolved, "in accordance with the Supreme Judicial Court's decision, *Landry* v. *Attorney General*, 429 Mass. 336, 338 (1999), and related rescript." Supp. App. at 19s.a. Therefore, even assuming, solely for the sake of argument, that respondents' "mootness" concerns had any basis to them at all, those concerns have been fully addressed: There *is* a "live dispute" between the parties.

II. RESPONDENTS' OPPOSITION UNDERSCORES THE NEED FOR SUPREME COURT REVIEW: DIFFERING RATIONALES HAVE BEEN USED BY THE LOWER COURTS TO UPHOLD MANDATORY DNA SEIZURE STATUTES, AND THE "SPECIAL NEEDS" ARGUMENT ADVANCED BY RESPONDENTS HAS BEEN REJECTED BY AT LEAST ONE CIRCUIT COURT.

On the merits, respondents' opposition serves only to highlight why this Court should grant certiorari. Without respond-

ing to petitioners' argument that the constitutionality of DNA seizure and dissemination statutes has become an issue of truly national importance since Congress enacted the DNA Identification Act in 1994, Cert. Pet. 23-27, respondents contend that review should not be granted because there is no split among the decided cases. Opp. Cert. 8-13. Although petitioners have not suggested that there is a split, a reading of the cases cited by respondents does not reveal any coherent or consistent rationale to justify the result they have reached. Respondents acknowledge that the courts are divided on the question of whether the "special needs" doctrine is applicable to the question of whether suspicionless DNA seizure statutes are reasonable under the Fourth Amendment. Opp. Cert. 14; App. 13a. Courts and state legislatures are likewise divided on the limits, if any, on the government's authority to make use of DNA after it has been seized, analyzed, and "databanked." App. 11a-12a & n.8. None of the appellate cases that have upheld DNA seizure statutes offer a basis on which courts might draw any principled Fourth Amendment distinction between the suspicionless DNA testing of convicted criminals and the testing of any other class of persons who might reasonably be said to have a reduced privacy expectation in their identity, or to be statistically more likely to commit crimes than the population as a whole.

Respondents' own reliance on the "special needs" doctrine, Opp. Cert. 14-15, is particularly significant because this is an issue on which there is substantial disagreement among the federal circuit courts. Compare, *Edmond* v. *Goldsmith*, 183 F.3d 659, 664-665 (7th Cir. 1999) (Posner, C.J.) (striking down suspicionless drug interdiction roadblock: because, after *Chandler*, suspicionless search regime must involve "'concerns *other than* crime detection,'" the "purpose" of the regime is "critical to its legality. The program must be a bona fide effort to implement an authorized regulatory policy rather than a pretext for a dragnet search for criminals" (quoting *Chandler* v. *Miller*,

520 U.S. 505, 313 [1997]) (emphasis added by the Seventh Circuit), with *Roe* v. *Marcotte*, 193 F.3d 72 (2d Cir. 1999), 1999 WL 731599 (upholding DNA seizure statute under "special needs" doctrine, while conceding that DNA "samples may later be used for law enforcement purposes").

In recommending the "special needs" doctrine as a separate basis for upholding the act, respondents implicitly endorse petitioners' view, Cert. Pet. 21, that the record in this case will present the Court with an opportunity to consider whether that doctrine may validate a suspicionless search regime explicitly concerned with "search[ing] for criminals." *Edmond* v. *Goldsmith*, *supra*. The petitions for certiorari in *Rise* v. *Oregon*, 59 F.3d 1556, *cert. denied*, 517 U.S. 1160 (1996), and *Jones* v. *Murray*, 962 F.2d 302, *cert. denied*, 506 U.S. 977 (1992), were denied before the national DNA data base existed, at a time when many states had not even enacted such a statute, and when it was not certain, as it is now, that law enforcement would seek to make the "collection" of DNA from convicted persons a national goal.

CONCLUSION

If it is to be "reasonable" under the Fourth Amendment for the millions of men, women, and children in this country who have been convicted of a crime to have their expectation of privacy in their genetic identity reduced to zero (for that is precisely the consequence of legitimizing a regime that mandates mass DNA seizures without any quantum of individualized suspicion), it must be because this Court has said so, and has

explained to them, and all of us, why. Accordingly, the petition should be granted.

Respectfully submitted,

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December 13, 1999

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APPENDIX A

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH
NO. 07899
NO. 07916

DONALD E. LANDRY, et al.,

Plaintiffs-Appellees,

v.

SCOTT HARSHBARGER, ATTORNEY GENERAL, et al.,

Defendants-Appellants.

MOTION FOR EXPEDITED ISSUANCE OF RESCRIPT

In accordance with Mass. R. App. P. 23, the defendants-appellants in the above-captioned matters move for an order that the rescript in these matters issue immediately. As grounds for this motion, the defendants-appellants state as follows.

1. On April 13, 1999, the Court issued a decision concluding "that the preliminary injunction cannot be justified on the grounds relied on by the [Superior Court] judge . . . ." Landry, et al. v. Attorney General, et al., Nos.

SJC-07899 and 07916, slip. op. at 2 (April 13, 1999). The Court ordered entry of the following order on the docket: "The preliminary injunction entered in the Superior Court is vacated . . . ." Id. at 27.

2. The rescript in Nos. SJC-07899 and 07916 is dated April 13, 1999. In the ordinary course, the rescript would issue twenty-eight days later, on May 11, 1999. See Mass. R. App. P. 23.

3. While the preliminary injunction continues in effect, the defendants suffer significant harm. The injunction prevents the defendants from making any serious progress in carrying out the Legislature's mandate to compile the 10,000 DNA samples that will form the nucleus of the state DNA database. The harm is irreparable because inmates, probationers, and parolees required to submit DNA samples are regularly released from the custody or supervision of the Commonwealth.

4. To avoid further harm to the public interest, the defendants request that the Court issue the rescript immediately. Contemporaneously with this Motion, the defendants have filed in the Superior Court a Motion for Entry of Order Vacating Preliminary Injunction Pursuant to Pursuant to Order of Supreme Judicial Court.

WHEREFORE, the defendants request that their motion for expedited issuance of the rescript be allowed.

Respectfully submitted,

DEFENDANTS,
by their attorneys,

THOMAS F. REILLY
ATTORNEY GENERAL

/s/

Rosemary S. Gale, BBO #557731
Government Bureau
Assistant Attorney General
One Ashburton Place
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Date: April 14, 1999

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPREME JUDICIAL COURT
NOS. 07899, 07916

DONALD LANDRY & others

v.

ATTORNEY GENERAL & others

PLAINTIFFS' OPPOSITION TO EXPEDITED ISSUANCE OF THE RESCRIPT AND MOTION TO STAY ISSUANCE OF THE RESCRIPT PENDING THE FILING AND DISPOSITION OF PLAINTIFFS' PETITION FOR CERTIORARI

Now come the plaintiffs and oppose the government's motion to expedite issuance of the rescript. The grounds for this motion are as follows.

1. In an opinion and order dated April 13, 1999, this Court vacated the preliminary injunction entered by the Superior Court and remanded the case to that court for further proceedings consistent with its opinion. Landry v. Attorney General, Nos. SJC 07899 and 07916, slip op. at 27 (April 13, 1999).

2. Pursuant to Mass. R.A.P. 23, "the rescript shall issue to the lower court twenty-eight days after the date of the rescript unless the time is shortened or enlarged by order."

3. The government, relying exclusively on the claim that any delay in the issuance of the rescript will cause it

"significant" and "irreparable" injury, seeks an order directing the clerk to issue the rescript forthwith.

4. The government's claims of irreparable injury are not different than the claims that were considered, and rejected, by a single justice of this Court (Marshall, J.) when the government previously moved to stay the injunction pending appeal. See Memorandum and Order of the Single Justice in Landry & others v. Attorney General & others, No. SJ-98-M0065 (January 5, 1999) (copy attached).

5. Considering only the balance of harms and not the merits of the plaintiffs' constitutional claim, the single justice concluded that continuing the injunction pending appeal would cause the government "no specific resulting harm any different from any other stay of the implementation of legislation pending the resolution of a constitutional challenge to the legislation." Id. at 3.

The plaintiffs move to stay the issuance of the rescript pending the filing and disposition of a petition for writ of certiorari by the United States Supreme Court. The grounds for this motion are as follows.

1. The Court's conclusion in this case that a DNA blood search and seizure may be conducted without probable cause represents a substantial departure from the decisions of the Supreme Court in California v. Schmerber, 384 U.S. 757 (1966) and Winston v. Lee, 470 U.S. 753 (1985), and is based on a mischaracterization of the purpose of the DNA Seizure and Dissemination Act as "not to search for evidence of a crime." Slip op. at 15. In fact, as the Court acknowledges elsewhere in its opinion, the Legislature intended the DNA collected under the Act to be used as "'an integral part of the investigation and prosecution of criminal offenses.'" Slip op. at 3 (quoting the Act). Since the purpose of the bodily intrusions mandated by a DNA data bank statute is precisely to search for DNA evidence to be used in the investigation

and prosecution of criminal offenses, Schmerber and Winston are controlling as a matter of federal constitutional law.

2. The Court's decision in this case is also inconsistent with the Supreme Court's decisions in Chandler v. Miller, 520 U.S. 305 (1997), Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995), and Skinner v. Railway Labor Executives' Assn., 489 U.S. 602 (1989), which establish that bodily intrusions conducted without probable cause may be counted as "reasonable" under the Fourth Amendment only when the searches are motivated by "concerns other than crime detection." Chandler, supra.

3. For these reasons, and because the issues to be presented in the plaintiffs, petition for certiorari have national significance, the case is one that will present substantial issues as to which certiorari is appropriate.

4. Furthermore, as the single justice concluded, if enforcement of the Act is not enjoined pending appeal, "the plaintiffs will be subject to the precise search for which they have sought constitutional protection, and will be unable to retrieve any of the DNA data that the Commonwealth may have shared with any other law enforcement officers in the interim." Memorandum and Order of the Single Justice at 4.

5. In these circumstances, it is appropriate that issuance of the rescript be stayed. Indeed, such relief is specifically authorized in the federal courts pending the filing of a petition for a writ of certiorari. See Fed. R.A.P. 41(d)(2) (Court of Appeals' mandate to be stayed for a period not to exceed 90 days where party shows that certiorari petition "would present a substantial question and that there is good cause for a stay").

Wherefore, the government's motion for immediate issuance of the rescript should be denied. In addition, issuance of the rescript should be stayed pending the filing

and disposition of the plaintiffs, petition for a writ of certiorari.

Respectfully submitted,

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Dated: April 22, 1999.

ATTACHMENT TO APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. SJ-98-M0065
SJC-98-07916
SJC-98-07899

DONALD E. LANDRY, et al.

vs.

SCOTT HARSHBARGER, ATTORNEY GENERAL, et al.

MEMORANDUM AND ORDER

This case came before me for hearing on the motion of the defendants to stay a preliminary injunction issued by a judge in the Superior Court on August 12, 1998. The injunction prohibits, inter alia, the collection, analysis, and dissemination of deoxyribonucleic acid (DNA) samples as provided in the DNA Seizure and Dissemination Act, G. L. c. 22E, §§ 1-15.[1] The defendants have appealed from that

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[1] The order of the judge in the Superior Court entered on August 12, 1998, provides as follows:

> "Pending further Court order, the defendants are hereby enjoined from enforcing the DNA Seizure and Dissemination Act. The defendants will not participate in the collection, analysis and/or dissemination of DNA of the plaintiffs or of anyone subject to the provisions of the Act. DNA samples already in the possession of the Director of the State Crime Laboratory shall remain

order, pursuant to G. L. c. 231, § 118, second paragraph. On November 18, 1998, we granted the application of all parties for direct appellate review. Landry, et al v. Attorney General, et al, SJC-07899. On November 17, 1998, we granted direct appellate review in a related case Landry, et al v. Attorney General, et al, SJC07916.[2] The defendants now seek a stay of the preliminary injunction entered by the Superior Court in this case until this Court resolves the appeal.

The defendants argue that a stay is warranted because the public interest is harmed by preventing the development and implementation of the DNA database "as an important safety tool." Defendants claim that, pending appeal, "crimes go unsolved and recidivistic criminal activity undeterred," and that a continuation of the injunction "may result in the permanent inability of the Commonwealth to collect samples from convicted criminals whose custody or supervision expires during the pendency of the injunction.' The plaintiffs have opposed the motion alleging that they will suffer substantial prejudice if the stay is granted. They argue that, unless the stay remains in effect, their DNA will be collected, analyzed, and disseminated to State and Federal law enforcement agencies, with no guarantee that it can be retrieved if the plaintiffs ultimately prevail. They further point to the financial costs that they will be required to pay for DNA testing and analysis as provided in G. L. c. 22E, § 4(b). Finally, the defendants argue that any further delay in the implementation of the statute will cause no discernible harm to the defendants.

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sealed, impounded, segregated and separately stored pending further notice of the Court."

[2] The Commonwealth has requested that the two matters be consolidated. No action has been taken on that request.

Looking only at the issue of the balance of the harms, [3] I deny the defendants' motion for a stay of the preliminary injunction. I recognize that the stay prevents the implementation of the statute enacted by the Legislature, G. L. c. 22E, §§ 1-15. However, the defendants point to no specific resulting harm any different from any other stay of the implementation of legislation pending the resolution of a constitutional challenge to the legislation. As the plaintiffs have pointed out, the Legislature was fully aware of the pending constitutional challenge when it placed conditions on the appropriation of public funds for the implementation of the statute. See St. 1998, c. 194, § 2, line item 8100-0016. In addition, if the plaintiffs do not prevail on appeal, nothing precludes the Commonwealth from obtaining DNA samples from those individuals who are subject to the statute, after they are released from custody, parole or probation. The Commonwealth makes no claim that it will be unable to obtain DNA samples from those individuals at some point in the future. Nor have they made any claim that the Commonwealth will be required to expend any significant funds in undertaking such an endeavor. On the other hand, if the plaintiffs prevail, unless the stay remains in effect, the plaintiffs will be subject to the precise search for which they have sought constitutional protection, and will be unable to retrieve any of the DNA data that the Commonwealth may have shared with any other law enforcement officers in the interim. That the DNA samples collected may be destroyed will not be protection from the dissemination of DNA data that already has occurred. In summary, I am not persuaded

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[3] Because I conclude that the balance of harms tips toward the plaintiffs, I refrain from any consideration of the likelihood of success on the merits, and express no view with respect to the success of the merits.

that the public interest will be irreparably harmed, while the harm to the plaintiffs is real and irremediable.

In the alternative, the defendants have requested that consideration of their appeal be expedited. That request is reasonable and in any event, is not opposed by the plaintiffs. Accordingly, this matter shall be placed on the March list for an expedited hearing by the Full Court. Expedited disposition of the case will serve to minimize any interim harm, if it occurs at all, that the defendants allege in support of their motion to stay. It is ordered that the parties, after consultation with the Clerk of the Full Court, agree to a briefing schedule of this case (SJC-07899) and the related case (SJC-07916) that is consistent with both matters being heard in March by the Full Court.

/s/
Margaret H. Marshall
Associate Justice

Entered: January 5, 1999

APPENDIX C

Supreme Judicial Court for
the Commonwealth of Massachusetts
1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

APR 30 1999

Benjamin H. Keehn, Esquire
Committee for Public Counsel Services Appeals Unit
470 Atlantic Avenue, Suite 700 Boston, MA 02210

RE: Docket No. SJC-07899

DONALD E. LANDRY & others
vs.
ATTORNEY GENERAL & others

NOTICE OF DOCKET ENTRY

Please take note that on April 15, 1999, the following entry was made on the docket of the above-referenced case:

MOTION to expedite issuance of Rescript, filed for Attorney General by Rosemary S. Gale, A.A.G. under advisement. jmk. Notice sent. April 28, 1999, Motion to Expedite

Issuance of Rescript ALLOWED. By the Court. Notice sent.

Jean M. Kennett, Clerk

Dated: April 28, 1999

To: John Reinstein, Esquire
Benjamin H. Keehn, Esquire
Rosemary S. Gale, A.A.G.
Sandra F. Bloomenthal, Esquire Inst. for Science, Law & Technol
Atty. Lori B. Andrews
John F. Palmer, Esquire
Atty. Tracey Maclin
Toni G. Wolfman, Esquire
Mary Prosser, Esquire
Amy R. Goldstein, Esquire
Josephine H. Ross, Esquire
Carolyn Baker Ringel, Esquire
Wendy-Jean Murphy, Esquire
Middlesex Superior Court Dept.
Jerome Napolitano
Gary King

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT
NO. MICV98-462

DONALD E. LANDRY & others,

Plaintiffs

v.

ATTORNEY GENERAL & others,

Defendants

PLAINTIFFS' EMERGENCY MOTION FOR RELIEF FROM JUDGMENT AND FOR A STAY OF PROCEEDINGS

The plaintiffs in the above-entitled action hereby move the Court pursuant to Mass.R.Civ.P. 60(b), 365 Mass. 828 (1974), and Superior Court Rule 9A(e)(1), to enter an order vacating the final judgment for the defendants entered on May 26, 1999, and staying further proceedings in this action pending final disposition of the case by the Supreme Court of the United States. The grounds for this motion are as follows:

1. On August 18, 1998, the Superior Court entered a preliminary injunction in this case enjoining enforcement of St. 1997, c. 106, and holding that mandatory DNA testing under the statute violates the Fourth Amendment to the United States Constitution and Art. 14 of the Declaration of

Rights. The defendants appealed. The Supreme Judicial Court granted direct appellate review. On April 13, 1999, the Supreme Judicial Court reversed. The Court vacated the preliminary injunction and remanded the case to the Superior Court for further proceedings consistent with its opinion. Landry v. Attorney General, 429 Mass. 336 (1999).

2. On May 26, 1999, this Court dismissed the complaint and entered judgment for the defendants. Plaintiffs' motion to reconsider the judgment and order was denied on July 9, 1999.

3. On August 20, 1999, the plaintiffs filed a petition for a writ of certiorari in the United States Supreme Court to review the decision of the Supreme Judicial Court in this case. Landry v. Reilly, Petition for Certiorari No. 99-359. (A copy of the petition is submitted with this motion.)

4. Although the defendants initially waived their right to file an opposition to the plaintiffs' petition, the Supreme Court, on October 1, 1999, ordered them to do so (A. 1).

5. On December 2, 1999, the defendants filed a Brief in Opposition in the Supreme Court in which they have argued, *inter alia*, that the action is moot because final judgment has entered and the time for appeal to the Massachusetts Appeals Court has expired (A. 2-3).

6. In order to secure a judgment susceptible to review by the Supreme Court, the Attorney General argues that the plaintiffs should be required to pursue an appeal from this Court's final judgment though the Massachusetts appellate courts raising the same issues which were heard and determined by the Supreme Judicial Court.

7. The rules of the Supreme Court require that plaintiffs, reply to the defendants' brief in opposition to certiorari be filed on or before December 12, 1999, in order to ensure consideration of the reply brief before disposition of the petition by the Supreme Court.

8. The procedure recommended by the Attorney General is a waste of time and judicial resources. As a condition of obtaining review in the Supreme Court, it would require a second appeal, entirely *pro forma,* in all cases in which (a) an appeal from the denial or allowance of a preliminary injunction is resolved by reaching the merits of the underlying legal claim, and (b) final judgment enters in the trial court based on the judgment of the state appellate court.

9. The procedure is also manifestly unfair to the plaintiffs and is inconsistent with the public's interest in having important issues conclusively resolved in an expeditious manner. Should certiorari be denied on the present record, in which mootness has been advanced [as a grounds] for denial, it is certain that other persons subject to the statute would bring separate actions challenging its constitutionality so that the merits of the issue could be presented to the Supreme Court. Such a course would significantly delay final resolution of the important issues presented by the petition.

For the foregoing reasons, the plaintiffs request that this court:

A. Treat this as an emergency motion pursuant to Superior Court Rule 9A(e)(1);

B. Enter an order pursuant to Mass.R.Civ.P. 60(b) vacating the judgment entered on May 26, 1999;

C. Stay further proceedings pending final disposition of the case by the Supreme Court of the United States.

Respectfully submitted,

/s/
Benjamin H. Keehn
BBO #542006
COMMITTEE FOR PUBLIC COUNSEL SERVICES
Public Defender Division
470 Atlantic Avenue
Boston, Massachusetts 02210 (617) 482-6212

On behalf of Miriam Cartagena,
John Hallett, Albert Troisi, Vincent
Gallello, and Geoffrey Pironti

/s/
John Reinstein
BBO #416120
AMERICAN CIVIL LIBERTIES UNION OF
MASSACHUSETTS
99 Chauncy Street
Suite 310
Boston, Massachusetts 02111
(617) 482-3170

On behalf of Donald E. Landry and
William Pistorino

Dated: December 3, 1999.

CERTIFICATE OF SERVICE AND NOTICE

I, John Reinstein, certify that on December 3, 1999, I served a copy of the foregoing "Plaintiffs' Emergency Motion for Relief from Judgment and for a Stay of Proceedings," by "faxing" it and mailing it, first-class and postage prepaid, to Assistant Attorney General Catherine E. Sullivan, Office of the Attorney General, One Ashburton Place, Boston, MA 02108. I further certify that counsel for the plaintiffs in this action notified AAG Sullivan that, at two o'clock P.M. on Friday, December 3, 1999, the plaintiffs would request that the foregoing motion be allowed or that a hearing be promptly scheduled.

/s/

John Reinstein
BBO #416120
AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS
99 Chauncy Street
Suite 310
Boston, Massachusetts 02111
(617) 482-3170

APPENDIX E

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT
CIVIL NO. 98-0462

DONALD E. LANDRY, ET AL.,
Plaintiffs

v. ORDER
ATTORNEY GENERAL, ET AL.,
Defendants

After hearing, it is Ordered, that Plaintiffs' Emergency Motion for Relief from Judgment and for a Stay of Proceedings be, and the same hereby is, Allowed in part; and it is

Further Ordered, that the Judgment entered May 26, 1999 dismissing the Complaint be, and the same hereby is, vacated as improvidently entered, the preliminary injunction entered August 18, 1998 nonetheless remaining dissolved, in accordance with the Supreme Judicial Court's decision, Landry v. Attorney General, 429 Mass. 336, 338 (1999), and related rescript.

/s/
Hiller B.Zobel,
Associate Justice,
Superior Court

Dated: December 3, 1999

APPENDIX F

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT
NO. MICV98-462

DONALD E. LANDRY & others,

Plaintiffs

v.

ATTORNEY GENERAL & others,
Defendants

PLAINTIFFS' NOTICE OF WAIVER

In conformity with their argument in support of their "Emergency Motion for Relief from Judgment and for a Stay of Proceedings" (see attached copy of letter to counsel for the defendants), which was heard and allowed in part on December 3, 1999 (Zobel, J.), the plaintiffs in the above-captioned matter hereby waive all claims in their amended complaint other than the Fourth Amendment claim that was

the subject of the Supreme Judicial Court's decision in Landry v. Attorney General, 429 Mass. 336 (1999).

Respectfully submitted,

/s/
Benjamin H. Keehn
BBO #542006
COMMITTEE FOR PUBLIC COUNSEL SERVICES
Public Defender Division
470 Atlantic Avenue
Boston, Massachusetts 02210
(617) 482-6212

On behalf of Miriam Cartagena, John Hallett, Albert Troisi, Vincent Gallello, and Geoffrey Pironti

/s/
John Reinstein
BBO #416120
AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS
99 Chauncy Street
Suite 310
Boston, Massachusetts 02111
(617) 482-3170

On behalf of Donald E. Landry and William Pistorino

Dated: December 13, 1999.

December 13, 1999

Cathleen E. Sullivan
Assistant Attorney General
One Ashburton Place
Boston, MA 02108

Re: Landry & others v. Attorney General & others
Middlesex County No. MICV98-462A
Plaintiffs' Emergency Motion for Relief from Judgment and for a Stay of Proceedings

Dear AAG Sullivan:

At the December 3, 1999, hearing before Judge Zobel on the above-captioned motion, we were surprised to hear that the government was concerned that allowance of the motion might somehow enable the plaintiffs to continue litigating claims in their amended complaint that do not pertain to the Fourth Amendment issue which was the subject of the SJC's decision in Landry, and which is the subject of the plaintiffs' petition for a writ of certiorari. As we represented to Judge Zobel at the hearing, the purpose of the motion is solely to address the contention raised by the government in its brief in opposition to that petition that the Superior Court's entry of a final judgment of dismissal had "mooted" the case entirely, so as to deprive the Supreme Court of its Article III jurisdiction to consider even the Fourth Amendment issue that was resolved by the Supreme Judicial Court in the government's favor. Although we believe the "mootness" argument to be wrong as a matter of law for reasons that we will present to the Supreme Court in our reply to the government's opposition to certiorari, vacating the order of

dismissal seemed to us the simplest way to remove the procedural bar that the government claimed to perceive. It is not our intent, now or at any time in the future, to assert any claim other than the Fourth Amendment claim, and, on behalf of the plaintiffs, we hereby waive all claims raised in the amended complaint other than the Fourth Amendment claim. We further represent that, if certiorari is denied, we will assent to entry of a final judgment of dismissal as to the entire amended complaint.

Sincerely,

/s/
Benjamin H. Keehn

/s/
John Reinstein

BHK & JR:lf